

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





75-4197

No. 75-4197

No. 75-4198

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

\_\_\_\_\_  
FRED A. BERZON and GERTRUDE BERZON, Appellants,

v.

\_\_\_\_\_  
COMMISSIONER OF INTERNAL REVENUE, Appellee.

ON APPEAL FROM DECISIONS OF THE UNITED STATES TAX COURT

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

Leonard L. Silverstein

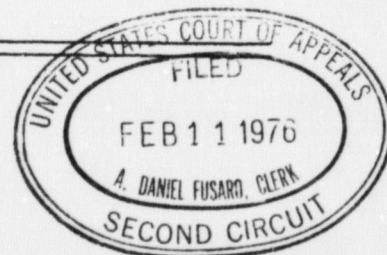
Robert E. Falb

SILVERSTEIN AND MULLENS  
1776 K Street, N. W.  
Suite 800  
Washington, D. C. 20006

Attorneys for appellants

Of Counsel:

Murray Roth  
HOFFINGER, FRIEDLAND & ROTH  
10 East 53rd Street  
New York, New York 10022



PAGINATION AS IN ORIGINAL COPY



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# UNITED STATES TAX COURT

## GENERAL DOCKET

DOCKET NO. 8615-71

FRED A. BERZON		APPEARANCES FOR PETITIONER:	
Westerleigh Road		Murray Roth, (Menes, <del>Sturin</del> , Roth & Fisher) 250-	
Purchase, New York 10577		-Park Ave., New York, N.Y. 10017- (Hoffinger,	
PETITIONER.		NAME Roth) 10 East 53rd Street, N.Y. , N.Y. 10022	
VS.		ADDRESS Messrs. Leonard L. Silverstein and Robert E.	
COMMISSIONER OF INTERNAL REVENUE,		Falb, Silverstein and Mullens, 1776 K Street, N.W.	
RESPONDENT.		Suite 800, Washington, D. C. 20006 (E/A 8/22/75)	

Date Month Day Year	Filings and Proceedings	Action	Served
Dec. 27, 1971	PETITION FILED: FEE PAID Dec. 27, 1971		Dec. 30, 1971
Feb 28, 1972	ANSWER filed by Resp		Feb 29, 1972
Feb 28, 1972	REQUEST by Resp for trial at NY, New York	GRANTED Feb 29, 1972	Feb 29, 1972
Sep. 7, 1973	NOTICE FOR TRIAL on Dec. 3, 1973 at New York, N.Y.		Sep. 7, 1973
Dec. 12, 1973	TRIAL at New York, New York before Judge Sterrett.		
	Joint Oral Motion to consolidate 8615-71 and 8616-71		
	for trial, brief, and opinion: Granted.		
	STIPULATION OF FACTS Filed with joint exhibits.		
	ORIGINAL BRIEFS DUE: February 11, 1974		
	REPLY BRIEFS DUE: March 13, 1974		
	SUBMITTED TO JUDGE STERRETT		
Jan. 3, 1974	TRANSCRIPT of Dec. 12, 1973 rec'd.		
Jan. 14, 1974	MOTION to Extend Time in Which to File Briefs filed by Petitioner.	See Order Jan. 15, 1974	
Jan. 15, 1974	ORDER that the motion filed on January 14, 1974 is granted and counsel for the parties shall file original simultaneous briefs on March 13, 1974 and reply briefs on April 12, 1974.		JAN 21 1974
March 11, 1974	BRIEF for Petitioner filed. (c/s, March 8, 1974 to resp.)		Mar. 14, 1974
March 13, 1974	BRIEF for Respondent filed.		MAR 14 1974

continued on page 2

Form No. 34  
May 1970

(Continuation)

GPO 900,390



3

# UNITED STATES TAX COURT

## GENERAL DOCKET

DOCKET NO. **8616-71**

<b>GERTRUDE BERZON</b> Westerleigh Road Purchase, New York 10577 VS. COMMISSIONER OF INTERNAL REVENUE,		<b>APPEARANCES FOR PETITIONER:</b> Murray Roth, (Hanes, Sturim, Roth & Fisher) 250-Park Ave., New York, N.Y. 10017- (Hoffinger, Friedland & Roth) 10 East 53rd Street, New York, New York 10022. ADDRESS Messrs. Leonard L. Silverstein and Robert E. Falb, Silverstein and Mullens, 1776 K Street, N.W. Suite 800, Washington, D. C. 20006 (E/A 8/22/75)
PETITIONER.		RESPONDENT.

Date Month Day Year	Filings and Proceedings	Action	Served
Dec. 27, 1971	PETITION FILED: FEE PAID Dec. 27, 1971		Dec. 30, 1971
Feb 28, 1972	ANSWER filed by Resp		Feb 29, 1972
Feb 28, 1972	REQUEST by Resp. for trial at NY, New York	GRANTED Feb. 29, 1972	Feb 29, 1972
Sep. 7, 1973	NOTICE FOR TRIAL on Dec. 3, 1973 at New York, N.Y.		Sep. 7, 1973
Dec. 12, 1973	TRIAL at New York, New York before Judge Sterrett.		
	Joint Oral Motion to consolidate 8615-71 and 8616-71		
	for trial, brief and opinion: Granted.		
	STIPULATION OF FACTS filed with joint exhibits.		
	ORIGINAL BRIEFS DUE: February 11, 1974		
	REPLY BRIEFS DUE: March 13, 1974		
	SUBMITTED TO JUDGE STERRETT		
Jan. 3, 1974	TRANSCRIPT of Dec. 12, 1973 rec'd.		
Jan. 14, 1974	MOTION to Extend Time in Which to File Briefs filed by Petr.	See Order Jan. 15, 1974	
Jan. 15, 1974	ORDER that the motion filed on January 14, 1974 is granted and counsel for the parties shall file original simultaneous briefs on March 13, 1974 and reply briefs on April 12, 1974.		JAN 21 1974
March 11, 1974	BRIEF for Petitioner filed. (c/s, March 8, 1974 to resp.)		Mar. 14, 1974
March 13, 1974	BRIEF for Respondent filed.		MAR 14 1974

continued on page 2

Form No. 34  
May 1970





## TAX COURT OF THE UNITED STATES

SEC 27 11 14

U.S. TAX COURT

-----x  
FRED A. BERZON,

Petitioner,

v.

Docket No.

COMMISSIONER OF INTERNAL  
REVENUE,Respondent.  
-----xPETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Service symbols Ap:NY:HW:DB) dated October 5, 1971, and as a basis for his proceeding, alleges as follows:

1. The petitioner resides at Westerleigh Road, Purchase, New York 10577. The returns for the periods herein involved were filed with the District Director of Internal Revenue for the Manhattan District.



2. The Notice of Deficiency, a copy of which is attached hereto and made a part hereof by this reference, was mailed to the petitioner on October 5, 1971.

3. The deficiency as determined by the Commissioner is for gift taxes for the calendar years 1965, 1966, 1967 and 1968 in the following amounts:

1965	\$4,757.58
1966	4,384.80
1967	5,170.17
1968	<u>5,877.00</u>
Total	<u>\$20,189.55</u>

The entire deficiency, as determined by the Commissioner, is in controversy.

4. The determination of tax set forth in said Notice of Deficiency is based on the following errors:

(a) The erroneous and illegal finding that the amounts reported as gifts by the petitioner in each of the years herein were in error, and accordingly adjusted as follows:

	<u>Total Amount of Gifts Reported by Petitioners</u>	<u>Total Gifts as Adjusted by Commissioner</u>
1965	\$52,800.00	\$54,396.00
1966	39,200.00	41,760.00
1967	43,600.00	47,200.00
1968	50,000.00	54,240.00

(b) The erroneous and illegal finding that the amount of gifts attributable to the petitioner's spouse, Gertrude Berzon, be adjusted as follows:

	<u>As Reported</u>	<u>As Adjusted</u>
1965	\$26,400.00	\$27,198.00
1966	19,600.00	20,880.00
1967	21,800.00	23,600.00
1968	25,000.00	27,120.00

(c) The erroneous and illegal finding that the beneficiaries did not receive an immediate, unrestricted right to the use, possession or enjoyment of all of the income of the trust, as a result of which it was determined that the gifts to the trusts were one of a future interest, and an exclusion of \$24,000.00 was



disallowed in each of the four years under consideration.

(d) The erroneous and illegal finding that gifts made in trust in 1962, 1963 and 1964 were gifts of future interests in property, resulting in a disallowance of exclusions in each of those years of \$15,000.00 or a total of \$45,000.00, and a finding that net gifts for years prior to 1965 were \$45,000.00 rather than -0- as claimed on petitioner's gift tax return for 1965.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The valuation of the securities which were the subject of the gifts were in all cases based upon values in a stockholders' agreement entered into at "arms' length" among all of the stockholders of the corporation. Under the terms of the agreement, none of the stock may be sold without first offering it for sale at the prices set forth in the agreement. The prices set forth in such agreement are effective

both for purposes of sale, and in the event of death of a stockholder.

(b) The gifts made were not gifts of future interests in property. Although income in the case of minor beneficiaries was to be accumulated to age twenty-one and paid over to them at that time, the Trustees had the right at all times to apply so much of the income otherwise required to be accumulated as they might determine to the support or maintenance of the beneficiary for whom such income is being accumulated. In addition, the trust instruments clearly provide that the net income held for an adult beneficiary shall be paid to such beneficiary not less frequently than quarter annually. In all of the years involved, from 1962 to 1968, two of the beneficiaries were adults.

(c) Gift tax returns were filed for each of the years 1962, 1963 and 1964. Copies of the trust agreement were submitted with the returns for 1962. There was correspondence relative thereto between the Internal Revenue Service and the petitioner, so that



the contents of the trust instrument were known to the Internal Revenue Service. No objection was made to such contents until after the examination of returns for the years 1965 to 1968. The petitioner was led to believe, by this inaction on the part of the Internal Revenue Service, that the exclusions were allowable, and such exclusions should not now be disallowed.

WHEREFORE, the petitioner prays that this Court may try the case and determine that:

(a) The total amount of gifts made by the petitioner for the years under review were as follows:

1965	\$52,800.00
1966	39,200.00
1967	43,600.00
1968	50,000.00

(b) The amount of gifts attributable to petitioner's spouse, Gertrude Berzon, were as follows:

1965	\$26,400.00
1966	19,600.00
1967	21,800.00
1968	25,000.00

(c) The beneficiaries received gifts of present interests and that the exclusions claimed on gift tax returns (Forms 709) filed by the petitioner be allowed as claimed.

(d) The petitioner did not make any net taxable gifts in the years 1962, 1963 and 1964.

Respectfully Submitted,

Counsel for Petitioner  
MURRAY ROTH, Esq.  
250 Park Avenue  
New York, New York 10017

Admitted to Practice as  
MORRIS ROTH

Of Counsel:

MANES, STURIM, ROTH & FISHER  
250 Park Avenue  
New York, New York 10017



STATE OF NEW YORK )  
 COUNTY OF NEW YORK ) ss.:

FRED A. BERZON, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

Subscribed and sworn  
 to before me this  
 14<sup>th</sup> day of December,  
 1971.

---

Fred A. Berzon

(Seal)

---

RUTH WOLF  
 Notary Public, State of New York  
 No. 81-122500  
 Qualified in New York County  
 Commission Expires March 30, 1973

## Department of the Treasury

Regional Commissioner  
Internal Revenue Service  
North-Atlantic Region

Date: OCT 5 1971 In reply refer to: Ap:NY:HW:ED



Mr. Fred A. Berzon  
Westerleigh Road  
Purchase, New York 10577

Dear Mr. Berzon:

<u>Calendar Year</u>	<u>Deficiency</u>
1965	\$4,757.58
1966	4,384.80
1967	5,170.17
1968	5,877.00

This letter is to notify you - as required by law - that we have determined the gift tax deficiencies shown above. I regret that we have been unable to reach a satisfactory agreement in your case. The enclosed statement shows how the deficiencies were computed.

If you do not intend to contest this determination in the United States Tax Court, please sign and return the enclosed waiver form. This will permit an early assessment of the deficiencies and limit the accumulation of interest. The enclosed self-addressed envelope is for your convenience.

If you decide not to sign and return the waiver, the law requires that after 90 days from the date of mailing this letter (150 days if this letter is addressed to you outside the United States and the District of Columbia) we assess and bill you for the deficiencies. However, if within the time stated you contest this determination by filing a petition with the United States Tax Court, Box 70, Washington, D.C. 20044, we may not assess any deficiencies and bill you until after the Tax Court has decided your case. You may obtain a copy of the rules for filing a petition by writing to the Clerk of the Tax Court at the Court's Washington, D.C. address.

If you intend to file a petition with the United States Tax Court, you must do so within the time stated above (90 or 150 days, as the case may be); this period is fixed by law, and the Court cannot consider your case if your petition is filed late.

Under section 7463 of the Internal Revenue Code, the United States Tax Court has a simplified procedure for handling cases where the disputed portion of the deficiency does not exceed \$1,000 for any one taxable year. You may obtain information on this special procedure, as

(over)

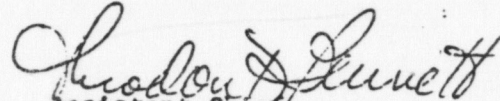
Form L-50A (Rev. 11-70)



well as a copy of the rules for filing a petition with the Tax Court, by writing to the Clerk of the Tax Court at the Court's Washington, D.C. address.

Sincerely yours,  
Johnnie M. Walters  
Commissioner

By

  
Assistant Chief,  
Appellate Branch Office

Enclosures:  
Waiver, Form 890-A  
Statement  
Envelope

FORM 4000 (REV. MAY 1970)	DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE  STATUTORY NOTICE STATEMENT	SYMBOLS  AP:HY:HW:DB
------------------------------	---	----------------------------

Fred A. Derzon  
Westerleigh Road  
Purchase, New York 10577

## KIND OF TAX

Gift

Calendar Year	DEFICIENCY
---------------	------------

1965	\$4,757.58
1966	4,384.80
1967	5,170.17
1968	<u>5,877.00</u>
Total	\$20,189.55

☒ Copy to Authorized Representative:

Murray Roth, Esq.  
250 Park Avenue  
New York, New York 10017



FORM 3615 (JULY 1963)		U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE GIFT TAX		AUDIT STATEMENT SCHEDULE	
NAME Fred A. Borzon				YEAR 1965	
ADJUSTMENTS TO NET OR TAXABLE GIFTS		Per Return		REVISED	
TOTAL GIFTS OF DONOR Adjustment (a)		\$ 52,800.00		\$ 54,396.00	
LESS: PORTION REPORTED BY SPOUSE Adjustment (b)		26,400.00		27,198.00	
BALANCE		\$ 26,400.00		\$ 27,198.00	
GIFTS OF SPOUSE TO BE INCLUDED		-		-	
TOTAL GIFTS		\$ 26,400.00		\$ 27,198.00	
LESS: TOTAL EXCLUSIONS Adjustment (c)		24,000.00		None	
TOTAL INCLUDED AMOUNT OF GIFTS		\$ 2,400.00		\$ 27,198.00	
LESS: CHARITABLE, PUBLIC AND SIMILAR GIFTS		-		-	
MARITAL DEDUCTION		-		-	
SPECIFIC EXEMPTION		2,400.00		2,400.00	
NET OR TAXABLE GIFTS FOR YEAR <u>1965</u>		\$ -0-		\$ 24,798.00	
TOTAL NET OR TAXABLE GIFTS FOR PRECEDING YEARS Adjustment (d)		-0-		45,000.00	
TOTAL NET OR TAXABLE GIFTS		-0-		\$ 69,798.00	
TAX COMPUTATION	TAX ON TOTAL NET OR TAXABLE GIFTS			\$ 9,182.58	
	LESS: TAX ON NET OR TAXABLE GIFTS FOR PRECEDING YEARS			4,425.00	
	TAX ON NET OR TAXABLE GIFTS FOR YEAR <u>1965</u>			\$ 4,757.58	
	GIFT TAX ASSESSED:			-0-	
	DEFICIENCY (Overassessment)			\$ 4,757.58	

FORM 3515 (JULY 1963)		U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE GIFT TAX		AUDIT STATEMENT SCHEDULE	
NAME			YEAR		
Fred A. Berzon			1966		
ADJUSTMENTS TO NET OR TAXABLE GIFTS		Per Return	REVISED		
TOTAL GIFTS OF DONOR	Adjustment (a)	\$ 39,200.00	\$ 41,760.00		
LESS: PORTION REPORTED BY SPOUSE	Adjustment (b)	19,600.00	20,880.00		
BALANCE		\$ 19,600.00	\$ 20,880.00		
GIFTS OF SPOUSE TO BE INCLUDED		-	-		
TOTAL GIFTS		\$ 19,600.00	\$ 20,880.00		
LESS: TOTAL EXCLUSIONS	Adjustment (c)	24,000.00	None		
TOTAL INCLUDED AMOUNT OF GIFTS		\$ -0-	\$ 20,880.00		
LESS: CHARITABLE, PUBLIC AND SIMILAR GIFTS		-	-		
MARITAL DEDUCTION		-	-		
SPECIFIC EXEMPTION		-	-		
NET OR TAXABLE GIFTS FOR YEAR	<u>1966</u>	\$ -0-	\$ 20,880.00		
TOTAL NET OR TAXABLE GIFTS FOR PRECEDING YEARS			69,798.00		
TOTAL NET OR TAXABLE GIFTS			\$ 90,678.00		
TAX COMPUTATION	TAX ON TOTAL NET OR TAXABLE GIFTS		\$ 13,567.38		
	LESS: TAX ON NET OR TAXABLE GIFTS FOR PRECEDING YEARS		9,182.58		
	TAX ON NET OR TAXABLE GIFTS FOR YEAR <u>1966</u>		\$ 4,384.80		
	GIFT TAX ASSESSED:		-0-		
	DEFICIENCY (Overassessment)		\$ 4,384.80		



FORM 3615 (JULY 1963)		U. S. TREASURY DEPARTMENT • INTERNAL REVENUE SERVICE	AUDIT STATEMENT SCHEDULE
NAME		GIFT TAX	
Fred A. Borzon		YEAR 1967	
ADJUSTMENTS TO NET OR TAXABLE GIFTS		Per Return	REVISED
TOTAL GIFTS OF DONOR Adjustment (a)		\$ 43,600.00	\$ 47,200.00
LESS: PORTION REPORTED BY SPOUSE Adjustment (b)		21,800.00	23,600.00
BALANCE		\$ 21,800.00	\$ 23,600.00
GIFTS OF SPOUSE TO BE INCLUDED		-	-
TOTAL GIFTS		\$ 21,800.00	\$ 23,600.00
LESS: TOTAL EXCLUSIONS Adjustment (c)		24,000.00	-0-
TOTAL INCLUDED AMOUNT OF GIFTS		\$ -0-	\$ 23,600.00
LESS: CHARITABLE, PUBLIC AND SIMILAR GIFTS		-	-
MARITAL DEDUCTION		-	-
SPECIFIC EXEMPTION		-	-
NET OR TAXABLE GIFTS FOR YEAR <u>1967</u>		\$ -0-	\$ 23,600.00
TOTAL NET OR TAXABLE GIFTS FOR PRECEDING YEARS			90,678.00
TOTAL NET OR TAXABLE GIFTS			\$114,278.00
TAX COMPUTATION	TAX ON TOTAL NET OR TAXABLE GIFTS		\$ 16,737.55
	LESS: TAX ON NET OR TAXABLE GIFTS FOR PRECEDING YEARS		13,567.38
	TAX ON NET OR TAXABLE GIFTS FOR YEAR <u>1967</u>		\$ 5,170.17
	GIFT TAX ASSESSED:		-0-
	DEFICIENCY (Overassessment)		\$ 5,170.17

FORM 3615 (JULY 1963)		U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE GIFT TAX		AUDIT STATEMENT SCHEDULE
NAME			YEAR	
Fred A. Berzon			1968	
ADJUSTMENTS TO NET OR TAXABLE GIFTS		Per Return	REVISED	
TOTAL GIFTS OF DONOR Adjustment (a)		\$ 50,000.00	\$ 54,240.00	
LESS: PORTION REPORTED BY SPOUSE Adjustment (b)		25,000.00	27,120.00	
BALANCE		\$ 25,000.00	\$ 27,120.00	
GIFTS OF SPOUSE TO BE INCLUDED		-	-	
TOTAL GIFTS		\$ 25,000.00	\$ 27,120.00	
LESS: TOTAL EXCLUSIONS Adjustment (c)		24,000.00	-0-	
TOTAL INCLUDED AMOUNT OF GIFTS		\$ 1,000.00	\$ 27,120.00	
LESS: CHARITABLE, PUBLIC AND SIMILAR GIFTS				
MARITAL DEDUCTION				
SPECIFIC EXEMPTION		1,000.00	1,000.00	
NET OR TAXABLE GIFTS FOR YEAR <u>1968</u>		\$ -0-	\$ 26,120.00	
TOTAL NET OR TAXABLE GIFTS FOR PRECEDING YEARS			114,278.00	
TOTAL NET OR TAXABLE GIFTS			\$140,398.00	
TAX COMPUTATION	TAX ON TOTAL NET OR TAXABLE GIFTS		\$ 24,614.55	
	LESS: TAX ON NET OR TAXABLE GIFTS FOR PRECEDING YEARS		18,737.55	
	TAX ON NET OR TAXABLE GIFTS FOR YEAR <u>1968</u>		\$ 5,877.00	
	GIFT TAX ASSESSED:		-0-	
	DEFICIENCY (Overassessment)		\$ 5,877.00	



Fred A. Berzon

Statement

EXPLANATION OF ADJUSTMENTS

- (a) It is determined that the fair market value of gifts of shares of capital stock of the Simon's Company, Inc. made by you and as detailed below was increased from the amount reported on your gift tax returns. The value of total gifts reported is increased accordingly:

<u>Date of Gift</u>	<u>Total Shares Gifted by Donor</u>	<u>Fair Market Value per Share as reported</u>	<u>Fair Market Value per Share as determined</u>	<u>Total Gifts of Donor as adjusted</u>
1965	120	\$440.00	\$453.00	\$54,396.00
1966	80	490.00	522.00	41,760.00
1967	80	545.00	590.00	47,200.00
1968	80	625.00	678.00	54,240.00

- (b) Due to the above adjustment the amount attributable to your spouse Gertrude Berzon is adjusted accordingly:

<u>Year of Gift</u>	<u>Amount Attributable to Spouse</u>	
	<u>As reported</u>	<u>As adjusted</u>
1965	\$26,400.00	\$27,198.00
1966	19,600.00	20,380.00
1967	21,800.00	23,600.00
1968	25,000.00	27,120.00

- (c) It is determined that under the trusts created December 28, 1962 and January 5, 1965, the beneficiaries did not receive an immediate, unrestricted right to the use, possession or enjoyment of all of the income of the trust. Therefore, since the gifts to the trusts are determined to be one of a future interest in property, no exclusions are allowable.

<u>Year</u>	<u>Total Exclusions Disallowed</u>
1965	\$24,000.00
1966	24,000.00
1967	24,000.00
1968	24,000.00

Fred A. Barzen

Statement

EXPLANATION OF ADJUSTMENTS (Cont'd)

- (d) Since gifts made under the aforementioned trust dated December 28, 1962 for the years 1962, 1963 and 1964 are similarly determined to be gifts of future interests in property, the total exclusions claimed in those years are disallowed in determining the total taxable gifts made prior to the year 1965 (Section 2504(c) and Regs. Sec. 25.2504-2 of the Internal Revenue Code).

<u>Year</u>	<u>Amount of Exclusion Disallowed</u>
1962	\$15,000.00
1963	15,000.00
1964	<u>15,000.00</u>
Total	\$45,000.00

Therefore, the total net or taxable gifts for preceding years for the 1965 calendar year is \$45,000.00 rather than -0- as claimed on your return.



AP:HY:H/:DB

Fred A. Berzon

FORM 890-A (REV. JAN. 1962) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE  <b>GIFT TAX          WAIVER OF RESTRICTIONS ON          ASSESSMENT AND COLLECTION OF DEFICIENCY AND          ACCEPTANCE OF OVERASSESSMENT</b>	DATE RECEIVED BY INTERNAL REVENUE SERVICE
---	---	---

Pursuant to the provisions of Section 6213(d) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws, the undersigned donor waives the restrictions provided in Sections 6212(c) and 6213(c) of the Internal Revenue Code of 1954, or corresponding provisions of prior internal revenue laws, and consents to the assessment and collection of the following deficiencies together with interest on the tax as provided by law; and accepts the following overassessments as correct:

Calendar		DEFICIENCIES	
YEAR ENDED	TAX	PENALTY	TOTAL
1965	\$4,757.58		
1966	4,384.80		
1967	5,170.17		
1968	5,877.00		

OVERASSESSMENTS			
YEAR ENDED	TAX	PENALTY	TOTAL

DONOR	ADDRESS OF DONOR
DATE	BY

NOTE.—The execution and filing of this form will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 7121 of the Internal Revenue Code of 1954 and does not, therefore, preclude the assertion of a deficiency or a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due; nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

FILED

## TAX COURT OF THE UNITED STATES 107-572-611 116

-----x  
GERTRUDE BERZON,

Petitioner,

v.

Docket No.

COMMISSIONER OF INTERNAL  
REVENUE,Respondent.  
-----xPETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Service symbols Ap:NY:HW:DB) dated September 27, 1971, and as a basis for her proceeding, alleges as follows:

1. The petitioner resides at Westerleigh Road, Purchase, New York 10577. The returns for the periods herein involved were filed with the District Director of Internal Revenue for the Manhattan District.



2. The Notice of Deficiency, a copy of which is attached hereto and made a part hereof by this reference, was mailed to the petitioner on September 27, 1971.

3. The deficiency as determined by the Commissioner is for gift taxes for the calendar years 1965, 1966, 1967 and 1968 in the following amounts:

1965	\$ 4,757.58
1966	4,384.80
1967	5,170.17
1968	<u>5,877.00</u>
Total	<u>\$20,189.55</u>

The entire deficiency, as determined by the Commissioner is in controversy.

4. The determination of tax set forth in said Notice of Deficiency is based on the following errors:

(a) The erroneous and illegal finding that the amounts reported as gifts by the petitioner's husband, Fred A. Berzon, in each of the years herein were in error, and accordingly adjusted as follows:

	Total Amount of Gifts Reported by <u>Petitioners</u>	Total Gifts as Adjusted by <u>Commissioner</u>
1965	\$52,800.00	\$54,396.00
1966	39,200.00	41,760.00
1967	43,600.00	47,200.00
1968	50,000.00	54,240.00

(b) The erroneous and illegal finding that the amount of gifts made by petitioner's husband, Fred A. Berzon, attributable to petitioner, be adjusted as follows:

	<u>As Reported</u>	<u>As Adjusted</u>
1965	\$26,400.00	\$27,198.00
1966	19,600.00	20,880.00
1967	21,800.00	23,600.00
1968	25,000.00	27,120.00

(c) The erroneous and illegal finding that the beneficiaries did not receive an immediate, unrestricted right to the use, possession or enjoyment of all of the income of the trust, as a result of which it was determined that the gifts to the trusts were one of a future interest, and an exclusion of \$24,000.00 was



disallowed in each of the four years under consideration.

(d) The erroneous and illegal finding that gifts made in trust in 1962, 1963 and 1964 were gifts of future interests in property, resulting in a disallowance of exclusions in each of those years of \$15,000.00 or a total of \$45,000.00, and a finding that net gifts for years prior to 1965 were \$45,000.00 rather than -0- as claimed on petitioner's gift tax return for 1965.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The valuation of the securities which were the subject of the gifts were in all cases based upon values in a stockholders' agreement entered into at "arms' length" among all of the stockholders of the corporation. Under the terms of the agreement, none of the stock may be sold without first offering it for sale at the prices set forth in the agreement. The prices set forth in such agreement are effective

both for purposes of sale, and in the event of death of a stockholder.

(b) The gifts made were not gifts of future interests in property. Although income in the case of minor beneficiaries was to be accumulated to age twenty-one and paid over to them at that time, the Trustees had the right at all times to apply so much of the income otherwise required to be accumulated as they might determine to the support or maintenance of the beneficiary for whom such income is being accumulated. In addition, the trust instruments clearly provide that the net income held for an adult beneficiary shall be paid to such beneficiary not less frequently than quarter annually. In all of the years involved, from 1962 to 1968, two of the beneficiaries were adults.

(c) Gift tax returns were filed for each of the years 1962, 1963 and 1964. Copies of the trust agreement were submitted with the returns for 1962. There was correspondence relative thereto between the



Internal Revenue Service and the petitioner, so that the contents of the trust instrument were known to the Internal Revenue Service. No objection was made to such contents until after the examination of returns for the years 1965 to 1968. The petitioner was led to believe, by this inaction on the part of the Internal Revenue Service, that the exclusions were allowable, and such exclusions should not now be disallowed.

WHEREFORE, the petitioner prays that the Court may try the case and determine that:

(a) The amount of gifts attributable to the petitioner were as follows:

1965	\$26,400.00
1966	19,600.00
1967	21,800.00
1968	25,000.00

(b) The beneficiaries received gifts of present interests and that the exclusions claimed on gift tax returns (Forms 709) filed by the petitioner be allowed

as claimed.

(c) The petitioner did not make any net taxable gifts in the years 1962, 1963 and 1964.

Respectfully Submitted,

Counsel for Petitioner  
MURRAY ROTH, Esq.  
250 Park Avenue  
New York, New York 10017

Admitted to Practice as  
MORRIS ROTH

Of Counsel:

MANES, STURIM, ROTH & FISHER  
250 Park Avenue  
New York, New York 10017



STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

GERTRUDE BERZON, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those she believes to be true.

---

Gertrude Berzon

Subscribed and sworn to  
before me this 14<sup>th</sup> day  
of December, 1971.

---

(Seal) RUTH WOLF  
Notary Public, State of New York  
No. 314028800  
Qualified in New York County  
Commission Expires March 30, 1973

## Department of the Treasury

Regional Commissioner  
Internal Revenue Service  
North-Atlantic Region

Date: SEP 27 1971

In reply refer to:  
AP:NY:HW:DBMrs. Gertrude Berzon  
Westerleigh Road  
Purchase, New York 10577

Dear Mrs. Berzon:

This letter is to notify you - as required by law - that we have determined a gift tax deficiency for the calendar year 1965 in the amount of \$4,757.58, a deficiency for the calendar year 1966 in the amount of \$4,384.80, a deficiency for the calendar year 1967 in the amount of \$5,170.17 and a deficiency for the calendar year 1968 in the amount of \$5,877.00. I regret we have been unable to reach a satisfactory agreement in your case. The enclosed statement shows how the deficiencies were computed.

If you do not intend to contest this determination in the United States Tax Court, please sign and return the enclosed waiver form. This will permit an early assessment of the deficiencies and limit the accumulation of interest. The enclosed self-addressed envelope is for your convenience.

If you decide not to sign and return the waiver, the law requires that after 90 days from the date of mailing this letter (150 days if this letter is addressed to you outside the United States and the District of Columbia) we assess and bill you for the deficiencies. However, if within the time stated you contest this determination by filing a petition with the United States Tax Court, Box 70, Washington, D.C. 20044, we may not assess any deficiencies and bill you until after the Tax Court has decided your case. You may obtain a copy of the rules for filing a petition by writing to the Clerk of the Tax Court at the Court's Washington, D.C. address.

If you intend to file a petition with the United States Tax Court, you must do so within the time stated above (90 or 150 days, as the case may be); this period is fixed by law, and the Court cannot consider your case if your petition is filed late.

Under section 7463 of the Internal Revenue Code, the United States Tax Court has a simplified procedure for handling cases where the disputed portion of the deficiency does not exceed \$1,000 for any one taxable year. You may obtain information on this special procedure, as


(over)



well as a copy of the rules for filing a petition with the Tax Court, by writing to the Clerk of the Tax Court at the Court's Washington, D.C. address.

Sincerely yours,  
 Johnnie M. Walters  
 Commissioner  
 By

Enclosures:  
 Waiver, Form 890-A  
 Statement  
 Envelope

  
 Assistant Chief,  
 Appellate Branch Office

FORM 4089  
(REV. MAY 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

STATUTORY NOTICE STATEMENT

SYMBOLS

AP:NY:HW:DB

Gertrude Berzon  
Westerlaigh Road  
Purchase, New York 10577

KIND OF TAX

Gift

Calendar Year

DEFICIENCY

1965	\$4,757.58
1966	4,384.80
1967	5,170.17
1968	<u>5,877.00</u>
Total	\$20,189.55

Murray Roth, Esq.  
250 Park Avenue  
New York, New York 10017

☒ Copy to Authorized Representative:



FORM 3615 (JULY 1963)		U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE GIFT TAX		AUDIT STATEMENT SCHEDULE
NAME			YEAR	
Gertrude Berzon			1965	
ADJUSTMENTS TO NET OR TAXABLE GIFTS		Per Return	REVISED	
TOTAL GIFTS OF DONOR		\$ -	\$ -	
LESS: PORTION REPORTED BY SPOUSE		-	-	
BALANCE		\$ -	\$ -	
GIFTS OF SPOUSE TO BE INCLUDED - Adjustment(a)		26,400.00	27,198.00	
TOTAL GIFTS		\$ 26,400.00	\$ 27,198.00	
LESS: TOTAL EXCLUSIONS - Adjustment(b)		24,000.00	-0-	
TOTAL INCLUDED AMOUNT OF GIFTS		\$ 2,400.00	\$ 27,198.00	
LESS: CHARITABLE, PUBLIC AND SIMILAR GIFTS		-	-	
MARITAL DEDUCTION		-	-	
SPECIFIC EXEMPTION		2,400.00	2,400.00	
NET OR TAXABLE GIFTS FOR YEAR <u>1965</u>		\$ -0-	\$ 24,798.00	
TOTAL NET OR TAXABLE GIFTS FOR PRECEDING YEARS Adjustment(c)		-0-	45,000.00	
TOTAL NET OR TAXABLE GIFTS		-0-	\$ 69,798.00	
TAX COMPUTATION	TAX ON TOTAL NET OR TAXABLE GIFTS		\$ 9,182.58	
	LESS: TAX ON NET OR TAXABLE GIFTS FOR PRECEDING YEARS		4,425.00	
	TAX ON NET OR TAXABLE GIFTS FOR YEAR <u>1965</u>		\$ 4,757.58	
	GIFT TAX ASSESSED:		-0-	
	DEFICIENCY (Overassessment)		\$ 4,757.58	

FORM 3615 (JULY 1963)		U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE <b>GIFT TAX</b>		AUDIT STATEMENT SCHEDULE
NAME			YEAR	
Gertrude Berzon			1966	
ADJUSTMENTS TO NET OR TAXABLE GIFTS		Per Return	REVISED	
TOTAL GIFTS OF DONOR		\$ -	\$ -	
LESS: PORTION REPORTED BY SPOUSE		-	-	
BALANCE		\$ -	\$ -	
GIFTS OF SPOUSE TO BE INCLUDED Adjustment (a)		19,600.00	20,880.00	
TOTAL GIFTS		\$ 19,600.00	\$ 20,880.00	
LESS: TOTAL EXCLUSIONS Adjustment (b)		24,000.00	-0-	
TOTAL INCLUDED AMOUNT OF GIFTS		\$ -0-	\$ 20,880.00	
LESS: CHARITABLE, PUBLIC AND SIMILAR GIFTS		-	-	
MARITAL DEDUCTION		-	-	
SPECIFIC EXEMPTION		-	-	
NET OR TAXABLE GIFTS FOR YEAR <u>1966</u>		\$ -0-	\$ 20,880.00	
TOTAL NET OR TAXABLE GIFTS FOR PRECEDING YEARS			69,798.00	
TOTAL NET OR TAXABLE GIFTS			\$ 90,678.00	
TAX COMPUTATION	TAX ON TOTAL NET OR TAXABLE GIFTS		\$ 13,567.38	
	LESS: TAX ON NET OR TAXABLE GIFTS FOR PRECEDING YEARS		9,182.58	
	TAX ON NET OR TAXABLE GIFTS FOR YEAR <u>1966</u>		\$ 4,384.80	
	GIFT TAX ASSESSED:			
	DEFICIENCY ( <i>Over-assessment</i> )		\$ 4,384.80	



FORM 3615 (JULY 1963)		U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE		AUDIT STATEMENT SCHEDULE	
NAME Gertrude Berzon				YEAR 1967	
ADJUSTMENTS TO NET OR TAXABLE GIFTS			Per Return	REVISED	
TOTAL GIFTS OF DONOR			\$ -	\$ -	
LESS: PORTION REPORTED BY SPOUSE			-	-	
BALANCE			\$ -	\$ -	
GIFTS OF SPOUSE TO BE INCLUDED Adjustment (a)			21,800.00	23,600.00	
TOTAL GIFTS			\$ 21,800.00	\$ 23,600.00	
LESS: TOTAL EXCLUSIONS Adjustment (b)			24,000.00	-0-	
TOTAL INCLUDED AMOUNT OF GIFTS			\$ -0-	\$ 23,600.00	
LESS: CHARITABLE, PUBLIC AND SIMILAR GIFTS			-	-	
MARITAL DEDUCTION			-	-	
SPECIFIC EXEMPTION			-	-	
NET OR TAXABLE GIFTS FOR YEAR <u>1967</u>			\$ -0-	\$ 23,600.00	
TOTAL NET OR TAXABLE GIFTS FOR PRECEDING YEARS				90,678.00	
TOTAL NET OR TAXABLE GIFTS				\$ 114,278.00	
TAX COMPUTATION	TAX ON TOTAL NET OR TAXABLE GIFTS			\$ 18,737.55	
	LESS: TAX ON NET OR TAXABLE GIFTS FOR PRECEDING YEARS			13,567.38	
	TAX ON NET OR TAXABLE GIFTS FOR YEAR <u>1967</u>			\$ 5,170.17	
	GIFT TAX ASSESSED:			-0-	
	DEFICIENCY (Overassessment)			\$ 5,170.17	

FORM 3615 (JULY 1963)		U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE		AUDIT STATEMENT SCHEDULE	
GIFT TAX					
NAME Gertrude Berzon				YEAR 1968	
ADJUSTMENTS TO NET OR TAXABLE GIFTS			Per Return	REVISED	
TOTAL GIFTS OF DONOR			\$ -	\$ -	
LESS: PORTION REPORTED BY SPOUSE			-	-	
BALANCE			\$ -	\$ -	
GIFTS OF SPOUSE TO BE INCLUDED Adjustment (a)			25,000.00	27,120.00	
TOTAL GIFTS			\$ 25,000.00	\$ 27,120.00	
LESS: TOTAL EXCLUSIONS Adjustment (b)			24,000.00	-0-	
TOTAL INCLUDED AMOUNT OF GIFTS			\$ 1,000.00	\$ 27,120.00	
LESS: CHARITABLE, PUBLIC AND SIMILAR GIFTS			-	-	
MARITAL DEDUCTION			-	-	
SPECIFIC EXEMPTION			1,000.00	1,000.00	
NET OR TAXABLE GIFTS FOR YEAR <u>1968</u>			\$ -0-	\$ 26,120.00	
TOTAL NET OR TAXABLE GIFTS FOR PRECEDING YEARS				114,278.00	
TOTAL NET OR TAXABLE GIFTS				\$ 140,398.00	
TAX COMPUTATION	TAX ON TOTAL NET OR TAXABLE GIFTS			\$ 24,614.55	
	LESS: TAX ON NET OR TAXABLE GIFTS FOR PRECEDING YEARS			18,737.55	
	TAX ON NET OR TAXABLE GIFTS FOR YEAR <u>1968</u>			\$ 5,877.00	
	GIFT TAX ASSESSED:			-0-	
	DEFICIENCY (Overassessment)			\$ 5,877.00	



Gertrude Berzon

Statement

EXPLANATION OF ADJUSTMENTS

- (a) It is determined that the fair market value of gifts of shares of capital stock of the Simon's Company, Inc. made by Fred A. Berzon and as detailed below was increased from the amount reported on your gift tax returns. The value of total gifts reported is increased accordingly:

<u>Date of Gift</u>	<u>Total Shares Gifted by Donor</u>	<u>Fair Market Value per Share as reported</u>	<u>Fair Market Value per Share as determined</u>	<u>Total Gifts of Donor as adjusted</u>
1965	120	\$440.00	\$453.00	\$54,396.00
1966	80	490.00	522.00	41,760.00
1967	80	545.00	590.00	47,200.00
1968	80	625.00	678.00	54,240.00

Therefore, the gifts of spouse to be included by you is adjusted accordingly:

<u>Year of Gift</u>	<u>Gifts of spouse to be included</u>	
	<u>As reported</u>	<u>As adjusted</u>
1965	\$26,400.00	\$27,198.00
1966	19,600.00	20,880.00
1967	21,800.00	23,600.00
1968	25,000.00	27,120.00

- (b) It is determined that under the trusts created December 28, 1962 and January 5, 1965, the beneficiaries did not receive an immediate, unrestricted right to the use, possession or enjoyment of all of the income of the trust. Therefore, since the gifts to the trusts are determined to be one of a future interest in property, no exclusions are allowable.

<u>Year</u>	<u>Total Exclusions Disallowed</u>
1965	\$24,000.00
1966	24,000.00
1967	24,000.00
1968	24,000.00

Gertrude Berzon

Statement

EXPLANATION OF ADJUSTMENTS (Cont'd)

- (c) Since gifts made under the aforementioned trust dated December 28, 1962 for the years 1962, 1963 and 1964 are similarly determined to be gifts of future interests in property, the total exclusions claimed in these years are disallowed in determining the total taxable gifts made prior to the year 1965 (Section 2504(c) and Regs. Sec. 25.2504-2 of the Internal Revenue Code).

<u>Year</u>	<u>Amount of Exclusion Disallowed</u>
1962	\$15,000.00
1963	15,000.00
1964	<u>15,000.00</u>
Total	\$45,000.00

Therefore, the total net or taxable gifts for preceding years for the 1965 calendar year is \$45,000.00, rather than -0- as claimed on your return.



AP:NY:HW:DB

Gertrude Berzon

FORM 890-A (REV. JAN. 1962) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE  <b>GIFT TAX</b> <b>WAIVER OF RESTRICTIONS ON</b> <b>ASSESSMENT AND COLLECTION OF DEFICIENCY AND</b> <b>ACCEPTANCE OF OVERASSESSMENT</b>	DATE RECEIVED BY INTERNAL REVENUE SERVICE
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Pursuant to the provisions of Section 6213(d) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws, the undersigned donor waives the restrictions provided in Sections 6212(a) and 6213(a) of the Internal Revenue Code of 1954, or corresponding provisions of prior internal revenue laws, and consents to the assessment and collection of the following deficiencies together with interest on the tax as provided by law; and accepts the following overassessments as correct:

Calendar		DEFICIENCIES	
YEAR <del>ENDING</del>	TAX	PENALTY	TOTAL
1965	\$4,757.58		
1966	4,384.80		
1967	5,170.17		
1968	5,877.00		

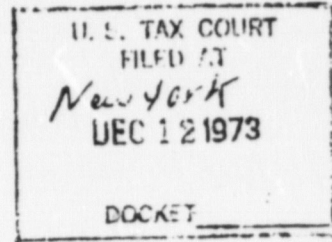
  

OVERASSESSMENTS			
YEAR ENDED	TAX	PENALTY	TOTAL

DONOR	ADDRESS OF DONOR
DATE	BY

NOTE.—The execution and filing of this form will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 7121 of the Internal Revenue Code of 1954 and does not, therefore, preclude the assertion of a deficiency or a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due; nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

ORIGINAL  
UNITED STATES TAX COURT



FRED A. BERZON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 8615-71
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	
GERTRUDE BERZON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 8616-71
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

STIPULATION OF FACTS

The parties hereby stipulate and agree that for the purpose of this case the following facts and exhibits attached hereto and made a part hereof may be taken as true, subject to the rights of the parties to introduce other and further evidence not inconsistent with this stipulation and preserving the parties' rights to object, at the time of trial, to any and all portions of said stipulation and attached exhibits as they may deem to be irrelevant or immaterial.



1. In December, 1971, the time of filing the petitions, petitioners' legal residence was Westerleigh Road, Purchase, New York 10577.

2. On September 20, 1962, the stockholders of The Simon's Co. Inc. entered into a Stockholder Agreement. A copy of said Agreement is attached hereto as Exhibit 1-A.

3. On December 28, 1962 the petitioners, as Grantors, entered into a Trust Agreement. A copy of said Agreement is attached hereto as Exhibit 2-B.

4. Fred A. Berzon filed United States Gift Tax Returns with the District Director of Internal Revenue, Manhattan District, New York, copies of said returns are attached as follows:

Exhibit 3-C: United States Gift Tax Return for the calendar year 1962 with attachments.

Exhibit 4-D: United States Gift Tax Return for the calendar year 1963 with attachments.

Exhibit 5-E: United States Gift Tax Return for the calendar year 1964.

Exhibit 6-F: United States Gift Tax Return for the calendar year 1965 with attachments including a Trust Agreement dated January 5, 1965.

Exhibit 7-G: United States Gift Tax Return for the calendar year 1966 with attachments.

Exhibit 8-H: United States Gift Tax Return for the calendar year 1967 with attachments.

Exhibit 9-I: United States Gift Tax Return for the calendar year 1968 with attachments.

5. Gertrude Berzon filed United States Gift Tax Returns with the District Director of Internal Revenue, Manhattan District, New York, copies of said returns are attached as follows:

Exhibit 10-J: United States Gift Tax Return for the calendar year 1965.

Exhibit 11-K: United States Gift Tax Return for the calendar year 1966 with attachments.

Exhibit 12-L: United States Gift Tax Return for the calendar year 1967.

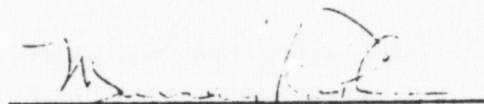
Exhibit 13-M: United States Gift Tax Return for the calendar year 1968.

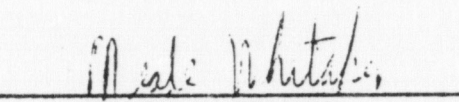
6. During the calendar years 1962-1968, inclusive, Fred A. Berzon made gifts of Capital Stock of the Simon's Co. Inc. owned by him, to Trusts dated December 28, 1962 and January 5, 1965. Attached hereto as Exhibit 14-N is a



summary of the annual gifts made by Fred A. Berzon.

7. Attached as Exhibit 15-0 is a summary of the officers and directors of The Simon's Co., Inc. for the years 1962-1968, inclusive.

  
Counsel for Petitioners.

  
MEADE WHITAKER, JST  
Chief Counsel,  
Internal Revenue Service.

## UNITED STATES TAX COURT

FRED A. &amp; GERTRUDE BERZON

Petitioner

vs

COMMISSIONER OF INTERNAL REVENUE

Respondent

8615-71  
DOCKET NO. 8616-71

LOCATION OF HEARING: New York City, New York

DATE: December 12, 1973

BEFORE: Honorable Samuel B. Sterrett

APPEARANCES: Murray Roth,  
Attorney for Petitioner  
Warren Dill,  
Attorney for Respondent



1 you are about to give the Court in this case shall be the  
2 truth, the whole truth and nothing but the truth, so help  
3 you God?

4 THE WITNESS: I do.

5 THE CLERK: Please, be seated, sir. State your  
6 name and address for the record, please.

7 THE WITNESS: Fred Berzon, B-e-r-z-o-n. Purchase,  
8 New York.

9 FRED BERZON,  
10 called as a witness, having been duly sworn, took the stand  
11 and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. ROTH:

14 Q Mr. Berzon, will you tell us the date of your  
15 birth?

16 A 1900.

17 Q What month?

18 A February 15th.

19 Q Okay. Now, what is your position, or has been  
20 your position with the Simons Company from 1962 to 1968?

21 A I was President.

22 Q I see. Now, in 19 -- prior to 1962, there were  
23 other -- there was someone else who was a president, wasn't  
24 there?

25 A Right.

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1 Q When did you become the president?

2 A 1962.

3 Q No. Weren't --

4 A Oh, no. '58.

5 Q 1958?

6 A Yeah.

7 Q Did you become the controlling stockholder at  
8 that time?

9 A Yes.

10 Q Fine. Now, there came a time toward the end of  
11 1962, when you set up a trust, or five trusts, for the bene-  
12 fit of your two children and three of your grandchildren.  
13 Can you tell the Court the circumstances surrounding that  
14 gift? In other words, how did you come to make that gift?  
15 Why did you make that gift? And what was your intent?

16 A Well, I made it because you told me that we had  
17 a surplus of about a half million dollars and that we bet-  
18 ter start declaring some dividends; and that I didn't need  
19 the money, and I thought -- I was thinking in direction  
20 of college and of subsequent benefits that the children  
21 would get. There was -- with that kind of a surplus, I felt  
22 we would certainly pay some dividends. That's what I did.

23 Q I see.

24 THE COURT: What does the company do? Is that  
25 stipulated?



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1 MR. ROTH: I don't think it is, Your Honor.

2 A We sell -- we're the largest distributors of  
3 mistakes of hosiery and pantyhose in the country. Only  
4 mistakes, only irregulars. I have contracts with the --  
5 like Hanes, and another one. We get all of their irregulars  
6 and believe me, they got a lot of them.

7 Q Now, this was on December 28, 1962. Now, the  
8 record shows that in 1963 and '64, you didn't pay any divi-  
9 dends. Was there any particular reason why the company  
10 didn't pay a dividend after you set up this trust with the  
11 intent of paying one? Why didn't you pay one?

12 A Oh, our principal competitor, Lewis, came to me  
13 and wanted to sell out. He felt he was getting too old,  
14 although he was younger than I am, and we dickered and we  
15 finally bought that business; and it turned out to be a  
16 very good purchase.

17 Q That was when?

18 A I think we bought it in about '64.

19 Q That's correct.

20 THE COURT: How much did you pay for it?

21 THE WITNESS: Oh, Jesus. We bought the -- we  
22 paid them a lump sum, and then we paid a couple of hundred  
23 thousand dollars. I think we had to pay for accounts re-  
24 ceivable, payable and inventory. But it involved maybe be-  
25 tween two and three hundred thousand dollars, but they had

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1 a good --

2 THE COURT: In cash?

3 THE WITNESS: Well, yes, we had to pay it. If  
4 we didn't have it -- well, we had surplus at that time,  
5 and then what we didn't have, we'd borrow. But it was a  
6 going business, and right off the bat, we did well with it,  
7 and we have it now, and it's a very important part of our  
8 business today. They handle the same stuff. We do it a  
9 little bit different anyway.

10 MR. ROTH: Now, in 1962, when you made these  
11 gifts, the beneficiaries were your daughter, Gloria; your  
12 son, Harold; and Gloria's three children?

13 A Yeah.

14 Q Now, Harold had three children at that time, too,  
15 didn't he?

16 A Well, his wife --

17 Q Why didn't you put his children in?

18 A Well, his wife is pretty well heeled, and I don't  
19 know, I didn't have the closeness that I had with my daughter.  
20 Although my son is in the business, I didn't have the close-  
21 ness there with those kids that I did -- that I have now,  
22 and one of them is already graduated college in December.

23 Q Uh huh. All right. Now, in 1965, early in 1965,  
24 you set up three new trusts for the benefit of Harold's  
25 children. And why did you then bring them in then?



1 A Well, we did bring them in, didn't we? Yes.

2 Q Yes, you did. Why?

3 A Well, because they were boys, and I thought that  
4 eventually, they'd come into the business as they grew older;  
5 and as I said before, the oldest one is in there now. And ✓  
6 he graduated Georgetown, and he's with us. And I was hoping  
7 the rest of them -- the business is big enough to handle  
8 more.

9 Q Now tell me, subsequent to 1965, are there any  
10 major events that have occurred that have prevented you from  
11 paying dividends? Did you make any other substantial pur-  
12 chase, or go into any additional business?

13 A I believe that's the time when we owned half of  
14 the building, and the people upstairs owned the other half,  
15 and they said, either you buy us out, or we buy you out. ✓  
16 And we didn't want to give up that corner, and it looked --  
17 we were right on the corner of 33rd and 5th, opposite the  
18 Empire State Building. It's a good building. So, we  
19 bought it. We paid 375,000 bucks for it.

20 Q Uh huh. And did you go into any other businesses  
21 in addition to that?

22 A Well, after that, we went into the outlet hosiery  
23 stores in Pennsylvania. I haven't been there since yester- ✓  
24 day. And we have 25 -- 24 of them, and we did that all in  
25 that short period of years, and it's wonderful. It's a con-

1       cept they have in Pennsylvania. The outlets -- we call them  
2       outlet stores; and it didn't hurt the business we had  
3       established with other stores. And these things, they're  
4       just wonderful, the most fascinating thing I ever had in my  
5       life, as far as business is concerned. And it's working out  
6       fine.

7               Q     Just a couple more questions, Mr. Berzon, and then  
8       I'll let you come off the stand. Now --

9               A     I didn't mean to go off --

10              Q     That's all right.

11              A     All right.

12              Q     You've had a stockholders' agreement with your  
13       co-stockholders all of these years?

14              A     Yes.

15              Q     In that agreement certain values were set on the  
16       stock of the corporation. In the Gift Tax Returns that have  
17       been filed, did you use those prices set up in the stock-  
18       holders' agreement?

19              A     Yes. At the end of each year, we get a figure,  
20       and then we added \$100,000 because we thought the building  
21       was in there for too low an amount, and if we were going to  
22       pay one another off, like my brother, Joe, when he died, it  
23       wouldn't have been fair because the building was worth more  
24       than we had it evaluated on.

25              Q     I was going to ask you that. When your brother,



**52**

1 Joe, died, he was a stockholder in the company, wasn't he?

2 A Yeah.

3 Q And did you pay his estate for his stock in accord-  
4 ance with the price set up in the stockholders' agreement?

5 A Oh, sure. That's the way we drew out of it. ✓

6 Q That's all the questions I have for you, Mr. Berzon.

7 CROSS EXAMINATION

8 BY MR. DILL:

9 Q Mr. Berzon, is the capital stock of the Simon  
10 Company, Incorporated, ever been traded publicly, or offered  
11 to the public?

12 A No.

13 Q Correct me if I'm wrong, but did you previously  
14 state that you took over controlling interest of the Simon  
15 Company, Incorporated, in 1958?

16 A Right.

17 Q Mr. Berzon, were dividends paid during the period  
18 from 1962 through 1968 inclusive?

19 A Dividends, we never paid any dividends. We wanted  
20 to, but there was always something came up about -- we  
21 couldn't.

22 Q Thank you. Mr. Berzon, let's make an assumption  
23 here just for the moment, that if dividends had been paid  
24 during during this interval between '62 and '68, who would  
25 have to vote for the payment of those dividends?

## Exhibit 1-A

AGREEMENT made this 20 day of September, 1962, by and among THE SIMONS CO., INC., a New York corporation with its principal office at 337 Fifth Avenue, Borough of Manhattan, City of New York (herein called the "Corporation"), FRED A. BERZON, JOSEPH BERZON, PHILIP BERZON, HAROLD BERZON and NORMAN SHUMAN (collectively called the "Stockholders" and sometimes individually referred to by their first names),

## WHEREAS:

1. The Corporation has an authorized capital stock of three thousand (3,000) shares of common stock of Forty (\$40.) Dollars par value, of which one thousand seven hundred twenty (1,720) are presently issued and outstanding, the total thereof being held by the individual parties hereto as follows:

FRED	1,020
JOSEPH	175
PHILIP	175
HAROLD	175
NORMAN	175

2. The Stockholders have for many years successfully conducted the business of the Corporation and desire to promote their mutual interests and the interest of the Corporation by imposing certain restrictions on the shares of stock of the Corporation and by defining the respective rights and obligations of all the parties hereto.

NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

FIRST: All previous agreements among the parties respecting the stock of the Corporation are hereby revoked.



SECOND: This agreement shall commence as of the date hereof and shall continue as to each of the individual parties so long as he shall remain a stockholder.

THIRD: Each of the individual parties shall be employed by the Corporation, and the Corporation agrees to employ each of them, in such capacities as the Board of Directors may determine, at such salaries as may from time to time be fixed by the Board of Directors. Each individual party hereby agrees that in consideration of such employment he, while so employed, will devote his full time and attention to the affairs of the Corporation and, further, that for a period of three (3) years from the cessation of such employment he will not be connected with, identified with or render service to, directly or indirectly, any person, firm, association or corporation engaged in the women's hosiery business within the continental limits of the United States, as stockholder, officer, employee, director, agent or otherwise. In the event of illness, accident or infirmity (all termed "illness") which shall prevent the substantial performance of the duties of any individual party, the salary received by him at the inception of such illness shall be continued for a period of six (6) months. If the said illness persists thereafter, then his salary for the succeeding six (6) months shall be diminished by half. If the said illness shall persist thereafter then, at the option of the Board of Directors, his employment and right to salary shall cease and terminate.

FOURTH: The Stockholders agree that so long as they own stock of the Corporation they will vote their stock to elect FRED, JOSEPH and HAROLD as Directors thereof. Should any vacancy occur in the Board of Directors while FRED is a Stockholder of the Corporation, by reason of the death, disability or other disqualification of JOSEPH or HAROLD, or should the number of Directors of the Corporation be increased by mutual consent, then it is agreed that the Stockholders shall vote their stock to elect such new Director, or Directors, as shall be designated by FRED.

FIFTH: No Stockholder shall transfer, dispose of or encumber his shares of the stock of the Corporation, without the consent of the other stockholders, except as follows:

1.) Any of the Stockholders may transfer all or part of his stock of the Corporation by gift to or for the benefit of himself, or any descendant, or any spouse of any descendant. In case of any such transfer, the transferee or transferees shall receive or hold the shares of stock subject to the terms of this agreement and there shall be no further transfer of such shares, except by gift between the individuals specified herein. Any stock transferred in trust for any beneficiary designated above (except insofar as the transferor may be the beneficiary) shall be redeemable by the Corporation, provided it has the necessary surplus, at any time after the date of this agreement and shall be paid for in cash. Any such stock not redeemed by the Corporation within ten (10) years from the date hereof shall be purchased by the Corporation from each trustee of such trusts, provided the Corporation shall



have the necessary surplus and shall be paid for in ten (10) equal annual instalments, together with four (4%) per cent interest with the right of prepayment without penalty. The purchase price to be paid by the Corporation in the event of either the redemption or purchase, as herein provided, shall be the price as specified hereinafter.

2.) No individual party hereto shall transfer or encumber his shares of the Corporation without the consent of the other individual parties, unless the Stockholder desiring to make the transfer or encumbrance (hereinafter referred to as "transferor") shall have first made the offer to sell hereinafter described and such offer shall not have been accepted:

(a) The offer shall be given by registered or certified mail to the Corporation and to the other signatory stockholders hereto and shall consist of an offer to sell all the shares of the capital stock of the Corporation owned by the transferor, to which shall be attached a statement of intention to transfer or encumber, as the case may be, the name and address of such prospective purchaser or lienor, the number of shares of capital stock involved in the proposed transfer or encumbrance and the terms of such transfer or encumbrance.

(b) Within thirty (30) days after the receipt of such offer, the Corporation may, at its option, elect to purchase all of the shares of the capital stock owned by the transferor. If such offer is not accepted by the Corporation, because of lack of adequate surplus, or for any other reason, the other/Stockholders may, within sixty (60) days

after the receipt of such offer at their option, purchase all the shares of the capital stock of the Corporation owned by the transferor. The Corporation and the Stockholders, as the case may be, shall exercise their election to purchase by giving notice thereof to the transferor by registered mail or certified mail. In either event, the notice shall specify a date, time and place for the closing of the purchase which shall not be more than fifteen (15) days after the date of the notice of acceptance.

(c) The purchase price of the stock shall be fixed on the basis of either a certificate of agreed value or book value defined as follows: "Book value" of the stock of the Corporation shall be determined as of the end of the month following the date of the offer by the accountant then servicing the Corporation, and such determination shall be binding upon the Corporation and upon all the parties hereto. Such determination shall be made in accordance with sound accounting practices and the following shall be observed:

(i) One (\$1.00) Dollar shall be allowed for good will, trade name and all other intangible assets, except those purchased for cash by the Corporation, shall be taken at the book value thereof.

(ii) All accounts payable shall be taken at face value less trade discounts, and all accounts receivable shall be taken at the face amount thereof less trade discounts and a reasonable reserve for bad debts.



(iii) All machinery, fixtures and equipment shall be taken at book value.

(iv) Merchandise inventory and supplies shall be computed at cost or market, whichever is lower.

(v) All unpaid and accrued taxes shall be deducted as liabilities.

A "certificate of agreed value" may be executed at any time by the signatory stockholders. Such certificate shall be signed by each such stockholder and filed with the Corporation. If at any time a certificate of value of the stock of the Corporation is in existence which is dated less than twelve (12) months before the date when the purchase price is to be determined, then the agreed value set forth in such certificate shall be conclusive and no accountant's determination of book value shall be required or made. In any event, a certificate of agreed value shall not be effective unless signed by all the signatory stockholders. The Stockholders may at any time execute a new certificate of agreed value which shall automatically replace all prior certificates and the last certificate of agreed value shall be effective for the purpose herein specified.

(d) The purchase price, as above specified, shall be paid in thirty-six (36) equal monthly instalments, as evidenced by promissory notes, the first note payable within three (3) months after the closing of the purchase payable successively monthly thereafter. Each note shall bear interest

at the rate of four (4%) per cent per annum from the date thereof and shall provide that the maker shall have the privilege of prepayment of all or any part thereof at any time with interest to date of prepayment with a thirty (30) day default clause, and each providing that a default in the payment of any note shall cause the remaining unpaid notes to become due and payable forthwith.

(3) If the offer to sell is neither accepted by the Corporation nor by the other signatory stockholders, the transferor may make a bona fide transfer or encumbrance to the prospective purchaser or lienor named in the statement attached to the offer within four (4) months after the date of his offer to sell, such sale or encumbrance to be made only in strict accordance with the terms therein stated. However, if the transferor shall fail to make such transfer or encumbrance within said four (4) months, such shares of capital stock shall again become subject to all the restrictions of this agreement.

SIXTH: Upon the death of a Stockholder (herein after referred to as the "decedent"), all of the shares of stock of the Corporation owned by him shall be sold and purchased as follows:

(1.) The Corporation shall purchase and the decedent's personal representative shall sell to the Corporation all such shares at the price set forth in Paragraph "FIFTH" herein, except that calculation of book value, if necessary, shall be as of the end of the month following the death. The method of payment shall also be the same with the exception that if the Corporation shall receive any proceeds of any policy



on the life of a decedent, such proceeds shall be paid by the Corporation to the decedent's personal representative to the extent of the purchase price of the decedent's stock in cash and the balance remaining, if any, shall thereupon be paid in the thirty-six (36) equal instalments as above provided.

(2.) The closing of such purchase and sale shall be held at a date, time and place designated by the Corporation in writing, by registered or certified mail, within sixty (60) days following the date of the qualification of the personal representative of the estate of the decedent, and shall be held not less than ten (10) days nor more than thirty (30) days after the date of such notice of closing.

(3.) If the Corporation shall not have sufficient surplus to permit it lawfully to purchase all such shares of capital stock, the obligation of the Corporation with respect to the shares which the Corporation shall be unable to purchase, shall be deemed assumed by the surviving signatory stockholders hereto.

SEVENTH: (1.) So long as any part of the purchase price of the shares of the capital stock sold in accordance with this agreement remains unpaid, the Corporation shall not declare or pay dividends, reorganize its capital structure, merge or consolidate with any other corporation, sell any of its assets, except in the regular course of business, shall not make any unusual expenditures inconsistent with prior practices and not reasonably required for the Corporation's business operations, or increase the salary of any of the individual signatory parties hereto, except that if FRED be

deceased or retired, the salaries of the other individual parties shall be equalized as of the highest salary then drawn by any one of them. If the Corporation breaches any of the obligations herein specified, the transferor or the decedent's personal representative, as the case may be, in addition to any other remedies available, may elect to declare the entire unpaid purchase price due and payable forthwith.

(2.) In the event of a liquidation of the Corporation, all notes outstanding and unpaid shall become immediately due and payable and shall be paid before any of the other stockholders shall receive any liquidating dividends.

EIGHTH: (1) Upon any closing of the purchase of the stock from a stockholder or from his estate, the transferor, or his personal representative, as the case may be, shall endorse the said stock in blank with revenue stamps affixed and deliver the same to the attorney for the Corporation who shall hold the same in escrow as collateral security for the payment of the purchase price upon the condition that upon the payment of each note, the same shall be cancelled and delivered to the maker thereof together with the proportion of the stock held by him in escrow represented by the amount of the note so paid. In the event that there shall be a default in the payment of any note which shall continue for a period of thirty (30) days, the escrowee shall deliver all of the notes in his possession remaining unpaid to the transferor or to the personal representative of his estate, as the case may be.



(2.) While such stock is held in escrow, and so long as there is no default in payment of the notes, the purchaser or purchasers, as the case may be, shall be entitled to all voting rights with respect thereto.

(3.) Upon such closing, the transferor shall deliver to the Corporation his resignation as an officer, director and employee effective forthwith.

NINTH: In addition to and notwithstanding any of the foregoing, it is agreed that the Corporation:

(1.) Shall pay to the widow of any of the individual signatory stockholders hereto, the sum of Five Thousand (\$5,000.) Dollars within thirty (30) days of the date of the death of such stockholder with the exception that in the case of the death of JOSEPH, said sum of Five Thousand (\$5,000.) Dollars shall be paid not to his widow, but to his estate.

(2.) In addition thereto, the Corporation shall pay to the widow of each of the signatory parties hereto, a sum equal to fifty (50%) per cent of the salary currently paid at the time of death, computed for a period of two (2) years from the date of death. Said payments shall be paid to the widow in quarter-annual instalments over a period of two (2) years commencing ninety (90) days after the date of such death.

TENTH: Each certificate of stock of the Corporation now or hereafter held or issued shall be endorsed with the following legend:

" This Certificate is transferable only in compliance with the provisions of a stockholders' agreement, which is on file in the office of the Corporation."

ELEVENTH: This agreement shall terminate in the event of liquidation, bankruptcy, receivership or dissolution of the Corporation, or by the mutual consent, in writing, of all the parties hereto.

TWELFTH: No waiver of any provision of this agreement shall be binding, nor shall any provision of this agreement be modified, unless the same shall be in writing, subscribed by the parties hereto.

THIRTEENTH: In the event that any of the provisions contained in this agreement shall be construed as invalid or unenforceable by any court of competent jurisdiction, the same shall not affect the remaining provisions of this agreement, which shall continue in full force and effect.

FOURTEENTH: This agreement shall be binding upon and shall inure to the benefit of the parties, their heirs, legal representatives and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

THE SIMONS CO., INC.

By:

*Fred A. Berzon*

*Fred A. Berzon*

FRED A. BERZON

*Joseph Berzon*

JOSEPH BERZON

*Philip Berzon*

PHILIP BERZON

*Harold Berzon*

HAROLD BERZON

*Norman Shuman*

NORMAN SHUMAN

MANES, STURIN  
& LAUFER  
70 PINE STREET  
NEW YORK 5, N. Y.



## Exhibit 2-B

TRUST AGREEMENT made this 28<sup>th</sup> day of December, 1962, by and between FRED BERZON and his wife, GERTRUDE BERZON, of Westerleigh Road, Purchase, New York, (hereinafter called the "Grantors") and FRED BERZON, of Westerleigh Road, Purchase, New York, and HAROLD BERZON, of Westerleigh Road, Purchase, New York, (hereinafter called the "Trustees").

The Grantors hereby assign, transfer and deliver the property described in Schedules A, B, C, D and E, attached hereto and made a part hereof, to the Trustees, such property and all other property which may hereafter become subject to this trust to be held by the Trustees and to be managed and disposed of in accordance with the provisions of this Agreement.

ARTICLE IDISPOSITION OF INCOME AND PRINCIPAL

The Trustees shall keep the trust property specified and described in Schedules A, B, C, D and E, attached hereto and made a part hereof, and shall hold such property in separate trust funds, subject to the terms hereof, for the respective benefits of the Grantors' children, HAROLD BERZON and GLORIA SHUMAN, and the Grantors' grandchildren, JANIE SUSAN SHUMAN, WENDY ANNE SHUMAN and AUDREY LYNN SHUMAN, (each of whom shall hereinafter sometimes be called the "Beneficiary").

The separate trust funds shall be called, respectively, THE HAROLD BERZON TRUST, THE GLORIA SHUMAN TRUST, THE JANIE SUSAN SHUMAN TRUST, THE WENDY ANNE SHUMAN TRUST, and THE AUDREY LYNN SHUMAN TRUST.

It is the intent of the Grantors to create five (5)

separate trusts to be administered, however, in the discretion of the Trustees in solido. All provisions herein contained shall apply to each such trust. The trusts shall be administered upon the following terms:

(A) The net income earned during the minority of any Beneficiary shall be accumulated and, except as otherwise provided in paragraph "(B)", shall be paid to such beneficiary when he or she attains majority. The net income of any trust held for an adult beneficiary shall be paid to such beneficiary in convenient installments not less frequently than quarter annually.

(B) Notwithstanding the provisions of paragraph "(A)", the Trustees shall have the power, in their sole discretion, to apply so much of the income otherwise required to be accumulated as they may determine to the support or maintenance of the Beneficiary for whom such income is being accumulated.

(C) Upon the attainment of the age of twenty-one (21) years by any Beneficiary hereunder who is a minor, all principal and income other than any shares of stock of THE SIMONS CO., INC., shall be paid over and distributed to the beneficiary, free and discharged of all trust.

(D) The trusts provided for hereunder shall terminate upon the happening of any one of the following events: (a) the redemption of the stock held by the respective trusts in THE SIMONS CO., INC., by such corporation, (b) the expiration of the period of twenty (20) years from the date of execution of this trust indenture, (c) the prior death of the beneficiary. Upon the termination



of the respective trusts as herein provided, the entire trust estate, as it shall then exist, both principal and income, shall be paid over and distributed to the beneficiary if he then be alive, free and discharged of all trust; if the beneficiary shall be deceased, then such trust estate shall be paid over and distributed to the estate of such beneficiary, free and discharged of all trust.

(E) The Trustees may make payments for the benefit of the Beneficiary directly to the Beneficiary or to the Beneficiary's guardian or other legal representative or by direct payment of expenses incurred for the benefit of the Beneficiary.

(F) No disposition, charge or encumbrance on the income or principal of this Trust, or any part thereof, by the Beneficiary by way of anticipation shall be valid or in any way binding upon the Trustees, and the Beneficiary shall not have the right to assign, transfer, encumber or otherwise dispose of such income or principal or any part thereof until the same shall be paid or distributed to the Beneficiary by the Trustees and no income or principal or any part thereof shall in any wise be liable to any claim of any creditor of the Beneficiary.

(G) The right of the Beneficiary to any distribution or application of principal or income shall in every case be subject to any charge or deduction which the Trustees may make against the same under the authority granted to the Trustees by law or by any provision of this Agreement.

ARTICLE IITRUSTEES' POWERS

The Trustees are authorized in their absolute discretion, with respect to any trust property at any time held or acquired by them, to exercise the following powers:

(A) To sell or otherwise dispose of the same at such time, in such manner, for cash or on credit, and upon such terms and conditions, as they shall deem advisable;

(B) To hold all or any part uninvested for such periods of time as they shall deem advisable;

(C) To retain and continue to retain the same and to make such purchases or exchanges, all at such times, in such manner and upon such terms as they shall deem advisable, and to invest in such bonds, preferred or common stocks, mortgages, interests in any kind of investment trust, or other evidences of rights, interests or obligations, secured or unsecured, or in such other property, real or personal, as they shall deem advisable, whether or not any investment shall produce income or be of a wasting asset nature, and without regard to any law concerning the investment of trust funds or to the amount which shall be invested in any one security or in any one kind of investment and even though all or substantially all of such investments may be in one or more common stocks or other equity securities;

(D) In making any purchase, exchange or other disposition of any property, to act in the common interest of the trusts created by this Agreement and other estates, trusts, accounts or clients of the Trustees and to hold investments or



any part of the trust estate in common or undivided interests with other persons, corporations or trusts;

(E) To manage, maintain, improve, lease (for any term whether or not extending beyond the term of the trust created by this Agreement or the term fixed by any law), mortgage partition or otherwise dispose of any real or personal property or any interest therein, to make alterations in any buildings now or hereafter located on any such property or to demolish the same, to construct new buildings, all in such manner and upon such terms and conditions as they shall deem advisable; and to enter into contracts or grant options with respect to any of the foregoing;

(F) To retain and operate any business held in trust and to do all things necessary and proper to that end;

(G) To foreclose mortgages and bid in property under foreclosure or to take title to property by conveyance in lieu of foreclosure, either with or without payment of consideration, to continue mortgage investments after maturity, either with or without renewal or extension, all upon such terms as they shall deem advisable; to consent to the modification, renewal or extension of any note, whether or not secured, or any bond or mortgage, or of any term or provision thereof, or of any guarantee thereof, or to the release of such guarantee; to release obligors on bonds secured by mortgages or to refrain from instituting suits or actions against such obligors for deficiencies; to use such part of the property held under this Agreement as they shall deem advisable for the protection of any investment in real property or in any mortgage on real

property;

(H) To abandon any property, real or personal, which they shall deem to be worthless or not of sufficient value to warrant keeping or protecting; to abstain from the payment of taxes, water rents, assessments, repairs, maintenance, and upkeep of any such property; to permit any such property to be lost by tax sale or other proceedings, or to convey any such property for a nominal consideration or without consideration;

(I) To exercise all rights as the owner of corporate or other securities or investments, including, without limitation, the right to vote in person or by proxy, to enter into and to participate in voting trusts and stockholders' agreements, to exercise or dispose of conversions, subscriptions, purchase or other options, and to hold any such securities or investments in their own names or in the name of a nominee, with or without disclosing the fiduciary relationship;

(J) To assent to or participate in any reorganization, readjustment, recapitalization, consolidation, merger, dissolution, sale or purchase of assets, lease, mortgage, contract or other action or proceeding by any corporation; to deposit securities or other property under, or become a party to, any agreement or plan for any such action or proceeding or for the protection of holders of securities; to subscribe to new securities issued pursuant to any such action or proceeding; to delegate discretionary powers to any reorganization, protective or similar committee; to exchange any property for any other property in connection with any of the foregoing;



to pay any assessments or other expenses in connection with any of the foregoing;

(K) To adjust, compromise and settle or refer to arbitration any claim in favor of or against the trust created by this Agreement and to institute, prosecute or defend such legal proceedings as they shall deem advisable;

(L) To lend money to the trust or to borrow money for the trust from any other party, whether for the purpose of raising funds to pay taxes or otherwise, and to give or not to give security therefor, all upon such terms and for such periods as they shall deem advisable;

(M) To employ and pay the compensation of such accountants, custodians, experts, counsel, legal or investment, and other agents as they shall deem advisable and to rely upon information or advice furnished by such accountants, custodians, experts, counsel or other agents;

(N) To pay any and all expenses, costs, fees, taxes, penalties or other charges and to charge the same against principal or income or partly against the principal and partly against the income of the whole or any part of the trust created by this Agreement in accordance with accepted accounting principles;

(O) To make any division, distribution or partition of Property in kind or otherwise;

(P) To determine all questions as between income and principal and to credit or charge to income or principal or to apportion between them any receipt or gain and any charge, disbursement or loss as is deemed advisable in the circumstances of each case as it arises. Where the discretion herein

conferred upon the Trustees shall not be exercised by them, matters relating to principal and income shall be governed by the law of the jurisdiction in which the trust is administered;

(Q) Generally, to exercise all such rights and powers and to do all such acts and to enter into all such agreements as persons owning similar property in their own right might lawfully exercise, do or enter into.

The powers herein granted to the Trustees shall, except as otherwise expressly provided, in no wise be limited or restricted by reference to, or inference from, the terms of any other power specified herein, and each such power shall be construed as an independent power, and the enumeration of specific powers shall be deemed to be supplementary to and not exclusive of the general powers of trustees pursuant to law, and shall include all powers necessary to carry the same into effect.

### ARTICLE III

#### EXPRESS POWER

Anything to the contrary herein notwithstanding, the Trustees are hereby advised with respect to any shares of stock held by them in THE SIMONS CO., INC. for the trusts herein provided, that such shares of stock are subject to the terms and provisions of a stockholders' agreement made by and among THE SIMONS CO., INC. and the various stockholders thereof and said Trustees are hereby authorized and directed to comply with the terms and provisions of said stockholders' agreement.



ARTICLE IVLIMITATION ON POWERS

Notwithstanding anything herein contained to the contrary, no powers enumerated herein or accorded to trustees generally pursuant to law shall be construed to enable the Grantors, or the Trustees, or any other person to purchase, exchange, or otherwise deal with or dispose of the principal or income of the trust for less than an adequate or full consideration in money or money's worth, or to enable the Grantors or the Trustees to borrow the principal or income of the trust, directly or indirectly, without adequate interest or security. No person other than the Trustees shall have or exercise the power to vote or direct the voting of any stock or other securities of the trust, to control the investment of the trust either by directing investments or reinvestments or by vetoing proposed investments or reinvestments, or to reacquire or exchange any property of the trust by substituting other property of an equivalent value.

ARTICLE VADDITIONS TO TRUST FUND

The Grantors and any other person may from time to time, by will or written instrument inter vivos transfer additional property, real or personal, to the Trustees to be received by the Trustees with their consent and held under this Agreement, and the Trustees shall have authority to receive such additional property and to hold, manage and dispose of the same subject to all of the provisions set forth in this Agreement, which

shall then or thereafter be applicable to such property.

#### ARTICLE VI

##### IRREVOCABILITY

It is the intent of the Grantors to part finally and irrevocably with all of the property described in Schedules A, B, C, D and E, attached hereto and made a part hereof and with any other property which may be subsequently added to the trust fund by the Grantors in accordance with the terms of Article V of this Agreement. Therefore, this Agreement may not be revoked, altered, amended or changed in any way.

#### ARTICLE VII

##### TRUSTEES

If either of the persons designated as Trustee herein is no longer able to serve as Trustee by reason of death, incapacity, resignation or otherwise, then GLORIA SHUMAN shall become the successor Trustee hereunder. If at any time there shall be only one (1) Trustee eligible to act hereunder, then such Trustee by instrument in writing attached to this trust indenture, duly acknowledged by such Trustee, shall designate a co-Trustee and upon such designation the co-Trustee so designated shall have all of the powers set forth hereunder as if originally designated by the Grantors.

Any individual Trustee may at any time resign by an instrument in writing executed by such Trustee and delivered to the next succeeding Trustee and to the Beneficiary. Any individual Trustee may at any time and from time to time, by



instrument in writing, delegate any or all of his rights, duties, powers, authority and privileges, whether or not discretionary, to any other Trustee, for such period or periods of time as may be designated in such written instrument; provided, however, that any such written instrument shall be revocable by any such delegating Trustee at any time.

No bond or other security shall be required of any Trustee for the faithful performance of his or their duties.

No person dealing with the Trustees shall be bound to see to the application or disposition of cash or other property transferred to the Trustees or to inquire into the authority for or propriety of any action by the Trustees.

No Trustee shall be obliged to examine the accounts or actions of any prior Trustee nor shall he be responsible for any acts or omissions of any prior Trustee.

The term "Trustee" whenever used in this Agreement shall be taken to mean the Trustee for the time being in office and such Trustee shall have the same rights, duties, powers, authority and privileges, whether or not discretionary, as if originally appointed hereunder.

#### ARTICLE VIII

##### ACCEPTANCE OF THE TRUST

FRED BERZON and HAROLD BERZON, as Trustees, hereby accept the Trust created by this Agreement and agree to act as Trustees, in accordance with the terms and provisions hereof.

FRED BERZON and HAROLD BERZON, as Trustees, hereby acknowledge receipt from the Grantors of the property referred

W. A. STURIN  
TO THE TRUSTEE  
NEW YORK, N. Y.

to in Schedules A, B, C, D and E hereof.

ARTICLE IX

NEW YORK LAWS TO APPLY

This Agreement has been executed and will be administered in the State of New York, and this Agreement shall be construed and regulated by, and all questions pertaining to its validity, construction, effect and administration shall be determined by, and in accordance with, the laws of the State of New York.

ARTICLE X

COMPENSATION OF TRUSTEES

The Trustees and any subsequent Successor Trustees shall receive no commissions or other compensation for serving as Trustees hereunder except if any such subsequent Successor Trustee shall be an institutional Trustee, in which case such institutional Trustee shall be entitled to receive the customary compensation paid to institutional Trustees in the State of New York.

ARTICLE XI

LIABILITY

The Trustees shall not be liable for any mistake or error in judgment in the administration of this Trust except



for willful misconduct or fraud.

IN WITNESS WHEREOF, the Grantors and Trustees  
have hereunto set their hands and seals the day and year first  
above written.

\_\_\_\_\_  
FRED BERZON, Grantor

\_\_\_\_\_  
GERTRUDE BERZON, Grantor

\_\_\_\_\_  
FRED BERZON, Trustee

\_\_\_\_\_  
HAROLD BERZON, Trustee

MANES, STURIM  
& LAUFER  
70 PINE STREET  
NEW YORK 5, N. Y.

SCHEDULE "A"

THE HAROLD BERZON TRUST - 60 shares of Capital Stock of  
THE SIMONS CO., INC.

SCHEDULE "B"

THE GLORIA SHUMAN TRUST - 15 shares of Capital Stock of  
THE SIMONS CO., INC.

SCHEDULE "C"

THE JANIE SUSAN SHUMAN TRUST - 15 shares of Capital Stock of  
THE SIMONS CO., INC.

SCHEDULE "D"

THE WENDY ANNE SHUMAN TRUST - 15 shares of Capital Stock of  
THE SIMONS CO., INC.

SCHEDULE "E"

THE AUDREY LYNN SHUMAN TRUST - 15 shares of Capital Stock of  
THE SIMONS CO., INC.



## 63 T. C. No. 58

## UNITED STATES TAX COURT

FRED A. BERZON, Petitioner v. COMMISSIONER OF INTERNAL  
REVENUE, Respondent

GERTRUDE BERZON, Petitioner v. COMMISSIONER OF INTERNAL  
REVENUE, Respondent

Docket Nos. 8615-71  
8616-71

Filed March 11, 1975.

\* \* \*

## FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts, together with the exhibits attached thereto, are incorporated herein by this reference.

Petitioners Fred A. Berzon and Gertrude Berzon maintained their legal residence in Purchase, New York

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1

All statutory references herein are to the Internal Revenue Code of 1954, as applicable to the taxable years involved, unless otherwise indicated.

at the time of the filing of the petitions herein. Each petitioner filed federal gift tax returns for the calendar years 1965, 1966, 1967 and 1968 with the district director of internal revenue at Manhattan, New York, New York. The transfers in question of The Simons Co., Inc. stock, including those in 1962, 1963, and 1964, were made by Fred A. Berzon. Gertrude Berzon, as the wife of Fred A. Berzon, consented for the calendar years 1962 through 1968, to have the gifts in question of The Simons Co., Inc. stock made by her husband treated as having been made one-half by her pursuant to the gift-splitting provisions of section 2513.

The Simons Co., Inc. (hereinafter Simons Co.) is in the business of distributing irregular hosiery and pantyhose. In 1958 Fred A. Berzon obtained controlling interest in and became president of Simons Co.<sup>2</sup> The stock of Simons Co. has never been traded publicly or offered to the public.

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2

The extent of this controlling interest was not stated. However as of January 1, 1962, Fred A. Berzon owned 1,020 out of the 1,720 shares of Simons Co. issued and outstanding stock.



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For the years 1962 through 1968, the officers and directors of Simons Co. were as follows:

Officers

1962-1967	Fred A. Berzon--President & Treasurer Joseph Berzon--Vice President & Secretary
1968	Fred A. Berzon--President & Treasurer Harold Berzon--Secretary

Directors

1962-1967	Fred A. Berzon Joseph Berzon Harold Berzon
1968	Fred A. Berzon Harold Berzon Philip Berzon Norman Shuman

On September 20, 1962, the stockholders (Fred A. Berzon, Joseph Berzon, Philip Berzon, Harold Berzon and Norman Shuman) of Simons Co. entered into a stockholders' agreement of which the relevant provisions are as follows:

FIFTH: No Stockholder shall transfer, dispose of or encumber his shares of the stock of the Corporation, without the consent of the other stockholders, except as follows:

1.) Any of the Stockholders may transfer all or part of his stock of the Corporation by gift to or for the benefit of himself, or any descendant, or any spouse of any descendant. In case of any such transfer, the transferee or transferees shall receive or hold the shares of stock subject to the terms of this agreement and there shall be no further transfer of such shares, except by gift between the individuals specified herein. Any stock transferred in trust for any beneficiary designated above (except insofar as the transferor may be the beneficiary) shall be redeemable by the Corporation, provided it has the necessary surplus,

- 6 -

at any time after the date of this agreement and shall be paid for in cash. Any such stock not redeemed by the Corporation within ten (10) years from the date hereof shall be purchased by the Corporation from each trustee of such trusts, provided the Corporation shall have the necessary surplus and shall be paid for in ten (10) equal annual instalments, together with four (4%) per cent interest with the right of prepayment without penalty. The purchase price to be paid by the Corporation in the event of either the redemption or purchase, as herein provided, shall be the price as specified hereinafter.

2.) No individual party hereto shall transfer or encumber his shares of the Corporation without the consent of the other individual parties, unless the Stockholder desiring to make the transfer or encumbrance (hereinafter referred to as "transferor") shall have first made the offer to sell hereinafter described and such offer shall not have been accepted:

(a) The offer shall be given \*\*\* to the Corporation and to the other signatory stockholders hereto and shall consist of an offer to sell all the shares of the capital stock of the Corporation owned by the transferor,\*\*\*.

(b) \*\*\* If such offer is not accepted by the Corporation, because of lack of adequate surplus, or for any other reason, the other Signatory Stockholders may, within sixty (60) days after the receipt of such offer at their option, purchase all the shares of the capital stock of the Corporation owned by the transferor. \*\*\*

(c) The purchase price of the stock shall be fixed on the basis of either a certificate of agreed value or book value \*\*\*.

(d) The purchase price, as above specified, shall be paid in thirty-six (36) equal monthly instalments, as evidenced by promissory notes, the first note payable within three (3) months after the closing of the purchase payable successively monthly thereafter. \*\*\*

3.) If the offer to sell is neither accepted by the Corporation nor by the other signatory stockholders, the transferor may make a bona fide transfer or encumbrance to the prospective purchaser or lienor \*\*\*.



SIXTH: Upon the death of a Stockholder (hereinafter referred to as the "decedent"), all of the shares of stock of the Corporation owned by him shall be sold and purchased as follows:

1.) The Corporation shall purchase and the decedent's personal representative shall sell to the Corporation all such shares at the price set forth in Paragraph "FIFTH" herein, except that calculation of book value, if necessary, shall be as of the end of the month following the death. The method of payment shall also be the same [with an exception not herein relevant].

\* \* \* \* \*

3.) If the Corporation shall not have sufficient surplus to permit it lawfully to purchase all such shares of capital stock, the obligation of the Corporation with respect to the shares which the Corporation shall be unable to purchase, shall be deemed assumed by the surviving signatory stockholders hereto.

SEVENTH: 1.) So long as any part of the purchase price of the shares of the capital stock sold in accordance with this agreement remains unpaid, the Corporation shall not declare or pay dividends,\*\*\*.

\* \* \* \* \*

TENTH: Each certificate of stock of the Corporation now or hereafter held or issued shall be endorsed with the following legend:

" This Certificate is transferable only in compliance with the provisions of a stockholders' agreement, which is on file in the office of the Corporation."

ELEVENTH: This agreement shall terminate in the event of liquidation, bankruptcy, receivership or dissolution of the Corporation, or by the mutual consent, in writing, of all the parties hereto.

TWELFTH: No waiver of any provision of this agreement shall be binding, nor shall any provision of this agreement be modified, unless the same shall be in writing, subscribed by the parties hereto.

\* \* \* \* \*

FOURTEENTH: This agreement shall be binding upon and shall inure to the benefit of the parties, their heirs, legal representatives and assigns.

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On December 28, 1962, petitioners created five separate trusts, by means of one document, one each for the benefit of their son Harold Berzon, their daughter Gloria Shuman, both over 21 years old, and three of their grandchildren, Janie Susan Shuman, then age 11, Wendy Anne Shuman, then age 9, and Audrey Lynn Shuman, then age 6. On January 5, 1965, petitioners created three separate trusts, again by means of one document, one each for the benefit of three of their other grandchildren, Harold Michael Berzon, then age 13, Richard Allen Berzon, then age 12, and Lawrence Charles Berzon, then age 9. The two trust indentures creating the eight trusts were identical<sup>3</sup> except for the designation of the person who was to constitute the beneficiary of each trust and except for the number of shares of Simons Co. stock given to each beneficiary. The relevant provisions of one of the indentures are as follows:

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<sup>3</sup>

The above mentioned trusts were identical except for the use of the word "direction" in the latter indenture in place of the word "discretion" in the earlier one in Article II which deals with the trustees' powers. The use of the word "direction" appears to be a typographical error. However, it is of no importance here since that clause is irrelevant to the question at hand.



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TRUST AGREEMENT made this 5th day of January, 1965, by and between FRED BERZON and his wife, GERTRUDE BERZON, of Westerleigh Road, Purchase, New York, (hereinafter called the "Grantors") and FRED BERZON, of Westerleigh Road, Purchase, New York, and HAROLD BERZON, of Westerleigh Road, Purchase, New York (hereinafter called the "Trustees").

\* \* \* \* \*

ARTICLE I  
DISPOSITION OF INCOME AND PRINCIPAL

\* \* \* \* \*

It is the intent of the Grantors to create three (3) separate trusts to be administered, however, in the discretion of the Trustees in solido. All provisions herein contained shall apply to each such trust. The trusts shall be administered upon the following terms:

(A) The net income earned during the minority of any Beneficiary shall be accumulated and, except as otherwise provided in paragraph "(B)", shall be paid to such Beneficiary when he or she attains majority. The net income of any trust held for an adult beneficiary shall be paid to such beneficiary in convenient installments not less frequently than quarter annually.

(B) Notwithstanding the provisions of paragraph "(A)", the Trustees shall have the power, in their sole discretion, to apply so much of the income otherwise required to be accumulated as they may determine to the support or maintenance of the Beneficiary for whom such income is being accumulated.

(C) Upon the attainment of the age of twenty-one (21) years by any Beneficiary hereunder who is a minor, all principal and income other than any shares of stock of THE SIMONS CO., INC., shall be paid over and distributed to the Beneficiary, free and discharged of all trust.

(D) The trusts provided for hereunder shall terminate upon the happening of any one of the following events: (a) the redemption of the stock held by the respective trusts in THE SIMONS CO., INC., by such corporation, (b) the expiration of the period of twenty (20) years from the date of execution of this trust indenture, (c) the prior death of the beneficiary. Upon the termination of the respective trusts as herein provided, the entire trust estate, as it shall then exist, both principal and income,

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shall be paid over and distributed to the Beneficiary if he then be alive, free and discharged of all trust; if the Beneficiary shall be deceased, then such trust estate shall be paid over and distributed to the estate of such Beneficiary, free and discharged of all trust.

\* \* \* \* \*

## ARTICLE II TRUSTEES' POWERS

The Trustees are authorized in their absolute discretion, with respect to any trust property at any time held or acquired by them, to exercise the following powers:

(A) To sell or otherwise dispose of the same at such time, in such manner, for cash or on credit, and upon such terms and conditions, as they shall deem advisable;

(B) To hold all or any part uninvested for such periods of time as they shall deem advisable;

(C) To retain and continue to retain the same and to make such purchases or exchanges, all at such times, in such manner and upon such terms as they shall deem advisable, and to invest in such bonds, preferred or common stocks, mortgages, interests in any kind of investment trust, or other evidences of rights, interests or obligations, secured or unsecured, or in such other property, real or personal, as they shall deem advisable, whether or not any investment shall produce income or be of a wasting asset nature, and without regard to any law concerning the investment of trust funds or to the amount which shall be invested in any one security or in any one kind of investment and even though all or substantially all of such investments may be in one or more common stocks or other equity securities; \*\*\*.

\* \* \* \* \*

## ARTICLE III EXPRESS POWER

Anything to the contrary herein notwithstanding, the Trustees are hereby advised with respect to any shares of stock held by them in THE SIMONS CO., INC. for the trusts herein provided, that such shares of stock are subject to the terms and provisions of a stockholders' agreement made by and among THE SIMONS CO., INC. and the various stockholders thereof and said Trustees are hereby authorized and directed to comply with the terms and provisions of said stockholders' agreement.



\* \* \* \* \*

ARTICLE IV  
ADDITIONS TO TRUST FUND

The Grantors and any other person may from time to time, by will or written instrument inter vivos transfer additional property, real or personal, to the Trustees to be received by the Trustees with their consent and held under this Agreement, and the Trustees shall have authority to receive such additional property and to hold, manage and dispose of the same subject to all of the provisions set forth in this agreement, which shall then or thereafter be applicable to such property.

\* \* \* \* \*

ARTICLE IX  
NEW YORK LAWS TO APPLY

This Agreement has been executed and will be administered in the State of New York, and this Agreement shall be construed and regulated by, and all questions pertaining to its validity, construction, effect and administration shall be determined by, and in accordance with, the laws of the State of New York.

During the calendar years 1962 through 1968

Fred A. Berzon made the following gifts of Simons Co.

stock to the aforementioned trusts on the following dates:

	<u>Dec. 28, 1962</u>	<u>Jan. 4, 1963</u>	<u>Jan. 3, 1964</u>	<u>Jan. 5, 1965</u>	<u>Jan. 4, 1966</u>	<u>Jan. 4, 1967</u>	<u>Jan. 4, 1968</u>
e Harold Berzon Trust	60	60	60	15	10	10	10
e Gloria Shuman Trust	15	15	15	15	10	10	10
e Janie Susan Shuman Trust	15	15	15	15	10	10	10
e Wendy Anne Shuman Trust	15	15	15	15	10	10	10
e Audrey Lynn Shuman Trust	15	15	15	15	10	10	10
e Harold Michael Berzon Trust				15	10	10	10
e Richard Allen Berzon Trust				15	10	10	10
e Lawrence Charles Berzon Trust				15	10	10	10



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The corpus of each of the above mentioned trusts always consisted exclusively of stock of Simons Co. No dividends were paid by Simons Co. for the period 1957 up to the time of the trial herein.

In 1963 or 1964, Simons Co. purchased the business of its principal competitor for a purchase price between \$200,000 and \$300,000. When Joseph Berzon died on December 10, 1967, Simons Co. purchased his 175 shares of stock pursuant to the aforementioned stockholders' agreement, the purchase price being paid over a 36-month period ending on March 1, 1971.

Simons Co. owned one-half of the building located in New York City at 335-39 Fifth Avenue in which its offices were located. The building was a five story brick commercial building approximately 60 years old on a corner lot approximately 59 x 95 feet. There was a store on the ground floor and office space on the upper floors. In 1968 Simons Co. purchased the other half of the building from United Merchants & Manufacturers for \$375,000.

For the purpose of determining an agreed-upon value per share for the Simons Co. stock each year under the aforementioned stockholders' agreement, the value

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attributed to Simons Co.'s one-half interest in the building located at 335-39 Fifth Avenue was increased by the arbitrary figure of \$100,000 to bring that value more in line with what the property was deemed worth. An appraisal of the fair market value of this building was never obtained by Simons Co.



Simons Co.'s income statements for the years 1963 through 1967 are as follows:

	<u>1963</u>	<u>1964</u>	<u>1965</u>	<u>1966</u>	<u>1967</u>
Net Income From Sales	\$3,312,397.30	\$3,553,740.58	\$4,405,581.25	\$4,660,113.09	\$5,055,323.76
Cost of Goods Sold	<u>2,728,282.36</u>	<u>2,747,510.55</u>	<u>3,534,234.24</u>	<u>3,696,920.34</u>	<u>3,938,119.36</u>
Gross Profit on Sales	\$ 584,114.94	\$ 806,230.03	\$ 871,347.01	\$ 963,192.75	\$1,117,204.40
Total Deductions	<u>578,649.90</u>	<u>679,033.72</u>	<u>769,815.09</u>	<u>840,833.65</u>	<u>975,655.71</u>
Net Profit Before Provision for Federal Income Tax	<u>\$ 5,465.04</u>	<u>\$ 127,196.31</u>	<u>\$ 101,531.92</u>	<u>\$ 122,359.10</u>	<u>\$ 141,548.69</u>
Net Profit after Federal Income Tax	<u>\$ 2,712.99</u>	<u>\$ 68,996.31</u>	<u>\$ 57,431.92</u>	<u>\$ 70,859.10</u>	<u>\$ 78,448.69</u>

Simons Co.'s end-of-year balance sheets for the years 1963 through 1967  
are as follows:

	<u>1963</u>	<u>1964</u>	<u>1965</u>	<u>1966</u>	<u>1967</u>
<u>ASSETS</u>					
<u>Current Assets:</u>	\$766,679.84	\$ 870,253.50	\$1,054,829.98	\$1,280,393.28	\$1,483,607.12
<u>Other Assets:</u>					
Investments	12,000.00	37,500.00	37,500.00	25,500.00	25,000.00
Cash Value of					
Life Insurance	22,660.70	24,658.66	26,338.63	27,670.13	28,555.49
Real Estate (Less					
Reserve for Depreciation)	161,126.44	166,702.73	163,282.02	159,861.31	157,087.97
Furniture and Fixtures					
(Less Reserve for					
Depreciation)	9,678.17	16,007.53	11,423.92	11,566.48	19,787.21
Leasehold Improvements	-	-	3,947.56	2,631.64	1,315.72
Deposit	425.00	425.00	425.00	425.00	925.00
Prepaid Expenses	7,613.06	7,473.64	8,603.08	8,469.20	9,094.98
 Total Assets	 <u>\$980,183.21</u>	 <u>\$1,123,021.06</u>	 <u>\$1,306,350.19</u>	 <u>\$1,516,517.04</u>	 <u>\$1,725,373.49</u>



	<u>1963</u>	<u>1964</u>	<u>1965</u>	<u>1966</u>	<u>1967</u>
<u>LIABILITIES AND CAPITAL:</u>					
Current Liabilities:	\$391,827.00	\$ 465,668.54	\$ 591,565.75	\$ 730,873.50	\$ 893,973.70
Non-Current Liabilities	-	-	-	-	65,384.90
Total Liabilities	<u>\$391,827.00</u>	<u>\$ 465,668.54</u>	<u>\$ 591,565.75</u>	<u>\$ 730,873.50</u>	<u>\$ 959,358.60</u>
<u>CAPITAL:</u>					
Capital Stock	\$ 68,800.00	\$ 68,800.00	\$ 68,800.00	\$ 68,800.00	\$ 61,800.00
Surplus	<u>519,556.21</u>	<u>588,552.52</u>	<u>645,984.44</u>	<u>716,843.54</u>	<u>704,214.89</u>
Total Capital	<u>\$588,356.21</u>	<u>\$ 657,352.52</u>	<u>\$ 714,784.44</u>	<u>\$ 785,643.54</u>	<u>\$ 766,014.89</u>
Total Liabilities and Capital	<u><u>\$980,183.21</u></u>	<u><u>\$1,123,021.06</u></u>	<u><u>\$1,306,350.19</u></u>	<u><u>\$1,516,517.04</u></u>	<u><u>\$1,725,373.49</u></u>

Simons Co.'s gross sales and total assets approximately doubled during the years 1957 through 1967.





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Using the values per share as agreed upon each year under the aforementioned stockholders' agreement, petitioners reported the aforementioned transfers of Simons Co. stock by Fred A. Berzon in the years 1962 through 1968 as follows:

<u>Year of Gift</u>	<u>Total Shares Transferred</u>	<u>Fair Market Value per Share as Reported</u>	<u>Total Value as Reported</u>
1962	120	\$385	\$46,200
1963	120	385	46,200
1964	120	400	48,000
1965	120	440	52,800
1966	80	490	39,200
1967	80	545	43,600
1968	80	625	50,000

In their gift tax returns for 1962 through 1964 and for 1965 through 1968 each petitioner claimed five and eight, respectively, annual exclusions of \$3,000 each.

In his notices of deficiency to petitioners (dated October 5, 1971 in docket No. 8615-71 and September 27, 1971 in docket No. 8616-71), respondent disallowed the claimed annual exclusions for the years 1965 through 1968 upon his determination that the beneficiaries received future interests in property. The respondent also redetermined the fair market value of the stock of Simons Co., and hence the total amounts of gifts for the years 1965 through 1968, as follows:

<u>Year of Gift</u>	<u>Fair Market Value as Determined</u>	<u>Total Gifts as Determined</u>
1965	\$453	\$54,396
1966	522	41,760
1967	590	47,200
1968	678	54,240

The respondent determined that the gifts of Simons Co. stock by Fred A. Berzon in the years 1962 through 1964 were also gifts of future interests for which exclusions under section 2503 were not allowable and thus increased the aggregate sum of taxable gifts of each petitioner as of the beginning of the calendar year 1965 by \$45,000, which is the amount of claimed annual exclusions of each petitioner for those years which he claims should have been disallowed.

#### OPINION

The first issue for decision requires our determination for gift tax purposes of the value of the stock of Simons Co. transferred by petitioner Fred A. Berzon to eight trusts during the years 1965 through 1968. In reporting the gifts of Simons Co. stock on their respective gift tax returns, petitioners valued the stock each year at the purchase price for the stock agreed upon yearly by the stockholders of Simons Co. in accordance with a stockholders' agreement. For purposes of determining



- 20,-

this agreed upon purchase price, the value attributed to the Simons Co.'s one-half interest in a building located at 335-39 Fifth Avenue was increased by the arbitrary figure of \$100,000 to bring that value more in line with what the property was deemed worth.

The stockholders' agreement provides basically that, except for gifts of Simons Co. stock to or for the benefit of that stockholder and any descendants or spouses of descendants of that stockholder, no stockholder shall transfer or encumber his stock without consent of the other stockholders unless he shall first have offered to sell at a price determined in accordance with the stockholders' agreement all his Simons Co. stock to the corporation and, if the corporation does not elect to purchase the offered stock, to the other stockholders. Upon the death of any stockholder, it was further agreed that the decedent's personal representative would sell and the corporation (or the other stockholders if the corporation did not have sufficient surplus to permit it lawfully to purchase) would purchase at the aforementioned price all of the deceased stockholder's Simons Co. stock. According to its terms, the stockholder's agreement was binding on the parties thereto, their heirs, legal

## OPINION

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The second issue for decision is whether petitioners are each entitled to eight \$3,000 annual exclusions per year under section 2503<sup>4</sup> in computing taxable gifts for transfers

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<sup>4</sup>

## SEC. 2503. TAXABLE GIFTS.

(b) Exclusions From Gifts.--In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1955 and subsequent calendar years, the first \$3,000 of such gifts to such person shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year. Where there has been a transfer to any person of a present interest in property the possibility that such interest may be diminished by the exercise of a power shall be disregarded in applying this subsection if no part of such interest will at any time pass to any other person.

(c) Transfer for the Benefit of Minor.--No part of a gift to an individual who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest in property for purposes of subsection (b) if the property and the income therefrom--

(1) may be expended by, or for the benefit of, the donee before his attaining the age of 21 years, and

(2) will to the extent not so expended--

(A) pass to the donee on his attaining the age of 21 years, and

(B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment as defined in section 2514(c).



of Simons Co. stock to eight trusts during the years 1965 through 1968. Section 2503(b) provides for the exclusion of the first \$3,000 of gifts to any person<sup>5</sup> during a calendar year. However, such exclusion applies only to gifts "other than gifts of future interests in property", or, in other words to present interests.

For gift tax purposes the term "future interest in property" refers to "any interest or estate, whether vested or contingent, limited to commence in possession or enjoyment at a future date." H. Rept. No. 708, 72d Cong., 1st Sess. (1932), 1939-1 (Part 2) C.B. 478; S. Rept. No. 665, 72d Cong., 1st Sess. (1932), 1939-1 (Part 2) C.B. 526. See also Commissioner v. Disston, 325 U.S. 442, 446 (1945) and section 25.2503-3(a), Gift Tax Regs. Section 25.2503-3(b), Gift Tax Regs., defines a "present interest in property" as "[a]n unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or term certain)."

Therefore, the determination of the question at hand requires the inquiry of whether, at the date of each gift, the interest received by a beneficiary was a present or future

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In the case of gifts made in trust, the beneficiary, not the trust or the trustee, is the "person" to whom the statute refers. Helvering v. Hutchings, 312 U.S. 393 (1941).

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interest. Jacob W. Blasdel, 58 T.C. 1014, 1017 (1972), affirmed per curiam 478 F. 2d 226 (5th Cir. 1973). Petitioners have the burden to show that their claims to the annual exclusions fall within the rule of law allowing those exclusions. Commissioner v. Disston, supra at 449. In resolving the question at hand we must consider the provisos of the trust indentures involved and the surrounding circumstances in order to decide the case on its own particular facts. Fondren v. Commissioner, 324 U.S. 18, 21-22 (1945); Jacob W. Blasdel, supra at 1018.

The specific claims of petitioners with respect to what interests conveyed through the trusts to the beneficiaries constitute present interests are unclear. Apparently petitioners claim the full value of the gifts (both the income and corpora interests) as present interests available for the exclusion under section 2503. We note that our task is made no easier by the fact that petitioners do not cite any Code sections, regulations or cases in an area fraught with judicial decisions.

It is well settled that a gift may be separated into its component parts, one of which may qualify as a present interest under section 2503(b). Commissioner v. Disston, supra at 447; Fondren v. Commissioner, supra at 21. We think it clear that as of the dates of the gifts,



under paragraphs (C) and (D) of Article I of the trust indentures, the rights of all the beneficiaries herein to the distribution of the corpora of the trusts were deferred and thus their interests in the corpora of the trusts are future interests for which annual exclusions under the provisions of section 2503(b), apart from (c), are not available. Fondren v. Commissioner, supra at 20-21; United States v. Pelzer, 312 U.S. 399, 404 (1941).

Clearly the use, possession or enjoyment of the corpus of each trust by any beneficiary was postponed until the happening of one of a number of future events of uncertain date (i.e., the redemption of the Simons Co. stock, the passing of 20 years from the date of execution of each trust indenture, the death of a beneficiary, or a minor's reaching age 21 if the Simons Co. stock placed in trust for him had been previously sold). Petitioners also cannot employ section 2503(c) in order to qualify the gifts of the principal interests in the Simons Co. stock as present interests with respect to the minor beneficiaries since there is no provision in the trust indentures for the expenditures of any of the trusts' corpora for the benefit of any minor beneficiary before his attaining the age of 21 as required by section 2503(c) (1). Commissioner v. Thebaut, 361 F. 2d 428 (5th Cir. 1966), affirming in part and reversing in part a Memorandum Opinion of this Court.

The question of whether the income interests qualify for the exclusion, or any part thereof, under section 2503(b) and (c) presents a more complex problem. It is clear that the two adult beneficiaries had the right to receive the income of their respective trusts at least quarterly under paragraph (A) of Article I of their trust indenture.

Under paragraphs (A), (B), (C) and (D) of Article I of the trust indentures, the minor beneficiaries were to have the income of their respective trusts accumulated until age 21. The trustees had the power to distribute the accumulated income for the support or maintenance of the beneficiary for whom the income was to be accumulated. Any undistributed accumulated income was to be distributed to the beneficiary upon his reaching the age of 21 and, if he died before age 21, the entire trust estate, including accumulated income, was to be paid to his estate. After reaching age 21, a beneficiary had the right to receive the income of his respective trust at least quarterly.

It is clear that, without use of section 2503(c), the income interest given to each minor beneficiary does not qualify as a present interest under section 2503(b).

Commissioner v. Disston, supra at 448-49; Fondren v.



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Commissioner, supra at 21. However, it is also clear that under our decision in Arlean I. Herr, 35 T.C. 732 (1961), affd. 303 F. 2d 780 (3d Cir. 1962), the minor beneficiaries' income interests up to age 21 in this case can and do meet the literal requirements of section 2503(c) and that under our decision in Estate of Levine, 63 T.C. (1974), the minor beneficiaries' rights to income after age 21 in this case can and do, in conjunction with their income interests prior to age 21 under section 2503(c), meet the literal requirements of section 2503(b). Since the rights to income of the eight beneficiaries come within the literal requirements of section 2503(b) and (c), respectively, we will assume, without deciding, that the gifts of the income interests were gifts of present interests. See Commissioner v. Lowden, 131 F. 2d 127, 128 (7th Cir. 1942); Andrew Geller, 9 T.C. 484, 494 (1947) and compare Jesse S. Phillips, 12 T.C. 210, 223 (1949); Leonard Rosen, 48 T.C. 834, 846 (1967) (dictum), revd. 397 F. 2d 245 (4th Cir. 1968); Vogel v. United States, 42 F. Supp. 103 (D. Mass. 1941).

A crucial inquiry involved in the issue at hand is whether the income interests herein are subject to valuation. "Since the statutory exclusion provided by Section 1003(b)(3) [the predecessor under the 1939 Code

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to section 2503(b)] applies to the first \$3,000 of a gift to each beneficiary, it is axiomatic that the interests transferred must have a determinable value." Fischer v. Commissioner, 288 F. 2d 574, 577 (3d Cir. 1961), affirming a Memorandum Opinion of this Court.

The question thus presented is whether the income interests in the Simons Co. stock transferred to the trusts in the years 1965 through 1968 can be valued. During the years in issue Simons Co. was a closely-held family corporation, of which petitioner Fred A. Berzon was president and controlling stockholder. Simons Co. did not pay any dividends from and during 1957 until the time of the trial herein, and there is no evidence in the record to indicate that any dividends were paid prior to 1957. The stock of the Simons Co. has never been traded publicly or offered to the public.

Fred A. Berzon testified that, before making the first gifts of Simons Co. stock in trust in 1962, he expected the corporation to pay dividends and that only because of certain business needs for funds did it not do so. However, in light of the corporation's dividend history up to the time of each gift and the fact that it had already (by 1965) spent several hundred thousand dollars to buy



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out a competitor, we think such self-serving testimony is entitled to little weight. The testimony of petitioner Fred A. Berzon and that of his son-in-law indicates to us that Simons Co. was pursuing a program of expansion which resulted in an increased drain on cash in order to increase its inventory and to open a chain of retail stores. Simons Co.'s gross sales and total assets approximately doubled between the years 1957 and 1967. Such expansion obviously requires cash (or credit to some extent) and would restrict, practically speaking, the ability to pay dividends.

We realize that in the trust indentures the trustees, who were both stockholders in Simons Co., did have the power to sell the Simons Co. stock and to reinvest the proceeds in income-producing property (as well as in non-income-producing property). However, there is no indication in the record that they intended to do so or that they would in fact reinvest in income-producing property. Moreover, the stockholders' agreement, to which the trust indentures are subservient, appears to prohibit any transfer, except by gift, of the Simons Co. stock by a donee of a stockholder. In such case, where the sole asset of the trust is Simons Co. stock, the power of the trustee (donee) to sell and reinvest would not be a factor to consider in valuing the income interest.

After considering the entire record, we conclude that, as of the time each gift of stock was made in the years 1965 through 1968, the income interests in question were

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insusceptible to valuation. Furthermore, we note that, insofar as the 1968 gift of stock is concerned, the stockholders' agreement prohibited the declaration of a dividend in the 36-month period (which apparently ended on March 1, 1971) during which the stock of Joseph Berzon was being paid for by the corporation.

We think the instant case is controlled by our decision in Leonard Rosen, supra, see also Stark v. United States, 345 F. Supp. 1263 (W.D. Mo. 1972), affirmed per curiam 477 F. 2d 131 (8th Cir. 1973), certiorari denied

U.S. (1974), and do not opt to follow the Fourth Circuit's reversal of our position in that case since, as previously noted, appeal in the instant case lies with the Second Circuit for which we have found no case on point decided by that circuit. In Leonard Rosen, supra, we held that gifted income interests in the stock of a corporation which was controlled by the donors and which had not paid any dividends were not reasonably susceptible to valuation. We further held that in such circumstances (i.e., where the income interests in fact have no value or value which is so uncertain as to be incapable of reasonable ascertainment), employment of the actuarial tables (not herein claimed by petitioners) may not be had to value such income interests since their use would produce a clearly erroneous valuation. No exclusion under section 2503 was therefore allowed in that case.



We are also alert to the fact that in Rosen v. Commissioner, 397 F. 2d 245, 248 (4th Cir. 1968), the court there said "It is conceded that a valuable right to receive income has been donated." There is no such concession in the instant case. We disagree with the court's reliance in Rosen v. Commissioner, supra at 247 on the power of the trustees to sell the gifted shares and reinvest the proceeds of any sale in income-producing property where there is no direction in the trust indenture or inclination shown on the part of the trustees to do so. In such cases the possibility itself that the trustees would sell the gifted stock and reinvest in income-producing property is so uncertain as to be incapable of being valued.

We also think that any indication in Rosen v. Commissioner, supra at 247, that the growth or appreciation potential of the stock itself gives value to an income interest for purposes of section 2503(b) misses the point. Granted the value of the Simons Co. stock may have increased each year and granted such appreciation in value, under the terms of the trust indentures herein, accrues ultimately to the benefit of each beneficiary, still the rights of the beneficiaries to such increase in value are not themselves present interests, and thus are irrelevant for purposes

of section 2503(b). This is so because the appreciation in value cannot be reduced to possession, enjoyment or use by the beneficiaries except upon the happening of some future event of uncertain date. Indeed the appreciation itself may vanish before the distribution date occurs.

We realize here that with respect to any minor beneficiary, except for Janie Susan Shuman, any appreciation<sup>6</sup> in value of the Simons Co. stock may be realized as income prior to his reaching age 21 and thus may be expendable for his benefit prior to age 21 if the Simons Co. stock is redeemed by Simons Co. on September 20, 1972. Thus, section 2503(c) may come into play. However, the stockholders' agreement states that Simons Co. will redeem any of its stock held in trust then only if it has adequate surplus. The short answer here is that it cannot be predicted whether the Simons Co. stock will appreciate in value or whether Simons Co. will then have a surplus enabling it to purchase and will then in fact purchase said stock. Because each minor's Simons Co. stock may still remain in trust after he has reached age 21 according to paragraph (C) of Article I of the trust indentures, we do not think section 2503(c) applies to allow an exclusion for possible appreciation

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Under the trust indentures the trustee had the authority to allocate any realized appreciation to trust income.



in value of the Simons Co. stock. In other words it is not certain that the appreciation in value, if any, of the Simons Co. stock (i.e., the "property" in section 2503(c)) will necessarily be converted to cash and paid over to a minor beneficiary upon his reaching age 21. See H. Rept. No. 1337, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong., 2d Sess., p. A322 (1954); S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong., 2d Sess., p. 479 (1954).

The third issue for decision is whether the \$3,000 annual exclusions for the years 1962 through 1964 claimed by petitioners under the provisions of section 2503 for gifts in trust of Simons Co. stock under the terms of the aforementioned 1962 trust indenture may be disregarded in determining the aggregate sum of taxable gifts made by each petitioner for computation of his and her gift tax due during the years 1965 through 1968. It is well settled that exclusions under section 2503, which have been erroneously allowed in prior years, may be disregarded in determining the gift tax due in a year under review even though the statute of limitations for those prior years has run. Commissioner v. Disston, supra at 449. Based upon our above reasoning for the years 1965 through

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1968, we think the claimed \$3,000 annual exclusions for the years 1962 through 1964 were erroneously allowed and must be disregarded in determining the correct gift tax due for the years 1965 through 1968.

Decisions will be entered  
under Rule 155.

Reviewed by the Court



UNITED STATES TAX COURT

1975 AUG 22 PM 2 06

FRED A. BERZON,

Petitioner,

v.


COMMISSIONER OF INTERNAL REVENUE,


Respondent.

Docket No. 8615-71

NOTICE OF APPEAL

Notice is hereby given that the above-named petitioner hereby appeals to the United States Court of Appeals for the Second Circuit from the decision of this Court entering in the above-captioned proceeding on the 11th day of June, 1975.

  
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UNITED STATES  
TAX COURT  
FILEDUNITED STATES TAX COURT 1975 AUG 22 PM 2 07

GERTRUDE BERZON,

Petitioner,

v.

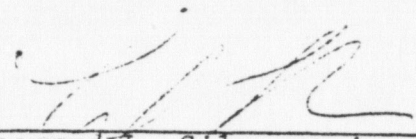
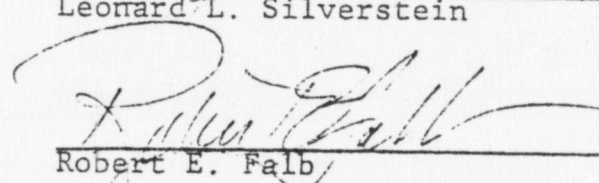
COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 8616-71

NOTICE OF APPEAL

Notice is hereby given that the above-named petitioner hereby appeals to the United States Court of Appeals for the Second Circuit from the decision of this Court entering in the above-captioned proceeding on the 11th day of June, 1975.

  
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## CERTIFICATE OF SERVICE

It is hereby certified that service of this appendix has been made on opposing counsel by mailing four copies thereof on this 10th day of February, 1976, in an envelope with postage prepaid, properly addressed to him as follows:

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